IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. , Original.

THE STATE OF KANSAS, COMPLAINANT,

vs.

ALBERT S. BURLESON, POSTMASTER GENERAL OF THE UNITED STATES, AND SOUTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, DEFENDANTS.

Comes now the defendant, Southwestern Bell Telephone Company, a corporation, and in response to the bill of complaint filed in the case above stated, says:

1. That this defendant moves to dismiss the said bill of complaint, for that the same is in effect a suit against the United States of America, and that the said United States of America is exempt from suit except by their consent, and that they have not consented to be sued in this action. Wherefore this defendant saith that said action should be dismissed.

2. This defendant further saith that this action should be dismissed, because the United States of America is an indispensable party to said action, and that the relief therein

prayed for cannot be granted without the presence of the said United States as a party defendant.

3. This defendant further saith that said bill of complaint should be dismissed, because, according to the allegations of said bill, it appears that the defendant, Albert S. Burleson, as Postmaster General of the United States, has taken possession of and is operating said telephone lines under and by virtue of the joint resolution of Congress of the United States, dated July 16, 1918, set forth in paragraph 9 in said bill of complaint, and of the proclamation of the President of the United States, set forth in paragraph 10 of said bill of complaint, and that the said relief sought is relief sought against the defendant Albert S. Burleson, as Postmaster General, in carrying out said joint resolution and said proclamation, and in the management and operation of said telephone lines thereunder; and it is not denied that said Albert S. Burleson, as Postmaster General, is lawfully in possession of the said lines and is operating the same under and by virtue of said joint resolution and said proclamation; that said suit is not one, therefore, against the defendant Albert S. Burleson as an individual, upon the ground that he has taken possession of said property and is operating same without warrant or authority under the laws of the United States, and that the same is therefore not of the class of suits which can be maintained without the presence of the United States of America as a party.

4. That said bill of complaint should be dismissed, because the actions of the defendant Albert S. Burleson, as Postmaster General, therein set forth, and the action of the defendant Albert S. Burleson, Postmaster General, therein complained of, each were done by him solely as the agent and under the orders of the President of the United States, and that the said President of the United States is not a party defendant to said suit and cannot be properly made such party defendant, and said suit is in effect a suit against said President of the United States.

5. This defendant moves to dismiss said bill of complaint, because the matters and things therein set forth do not entitle the complainant to the relief therein prayed or to any relief. Wherefore this defendant moves that said bill of complaint, for the reasons aforesaid, be dismissed.

Not waiving the said motion to dismiss said bill of complaint, and subject in all respects thereto and to the ruling thereon, this defendant answers said bill of complaint as follows:

1. This defendant admits each of the allegations of paragraph 1 of said bill of complaint.

2. This defendant admits the allegations of paragraph 2 of said bill of complaint.

3. This defendant admits that, prior to August 1, 1918, this defendant was engaged in business in the State of Kansas, as charged in paragraph 3 of said bill of complaint, and that the complainant, State of Kansas, employed this defendant for hire in the transmission of telephone toll messages between telephone stations in said State, but this defendant denies that it has been so engaged in transacting such business since August 1, 1918, but that its relation to such business since said time has been only that hereinafter set forth.

4. This defendant admits that, prior to August 1, 1918, it was engaged in transmitting general toll business, as set forth in paragraph 4 of said bill of complaint, and was employed by the State of Kansas in the transmission of telephone toll messages between telephone stations in Kansas and telephone stations in other States of the Union, but this defendant denies that it has been so engaged in transacting a general telephone toll business, as set forth in said paragraph 4 of said bill of complaint, since said August 1, 1918, but that its connection with any such business transacted since said date has been only that hereinafter set forth in this answer.

5. This defendant admits that, prior to August 1, 1918, it published and charged to the public, including the complainant, for the transmission of telephone toll or long-distance messages between stations in the State of Kansas, schedules of rates and charges fixed by it and approved by the Public Utilities Commission of the State of Kansas, and that said schedules were at that time its lawful schedules of charges, but this defendant denies that it charged said rates and charges since said August 1, 1918, but saith that since said August 1, 1918, all rates and charges made and charged for transmission of telephone toll or long-distance messages over the lines owned by it have been made and charged by the defendant Albert S. Burleson, as Postmaster General of the United States, operating said telephone lines under the authority and by virtue of the said joint resolution of Congress and the said proclamation of the President of the United States, set forth in full in paragraphs 9 and 10 of said bill of complaint. This defendant further admits that upon taking charge of and assuming the operation of said telephone lines, the defendant Albert S. Burleson, as Postmaster General, continued to charge the same schedules of rates and charges which were being charged by this defendant up to and until January 21, 1919, when the same were changed, as hereinafter set forth. This defendant admits that so much of said chapter 238 of the Laws of the State of Kansas of 1911, as set forth in paragraph 5 of the bill of complaint, is a correct copy of such provisions of such chapter.

6. This defendant admits so much of the allegations of paragraph 6 of said bill of complaint as purports to state the contents or substance of the schedule of rates for the transmission of telephone toll messages alluded to in said paragraph 6.

7. This defendant admits so much of paragraph 7 of said bill of complaint as states that on July 21, 1918, it presented to the Public Utilities Commission for the State of Kansas

an application to put into effect a classification and schedule of toll rates for its business within the State of Kansas, and that the same were on the basis set forth in paragraph 6 of said bill of complaint, but this defendant saith that whatever may have been the belief as to said schedule or rates at the time it was presented to the Public Utilities Commission the same were not, on January 21, 1919, the most practical and most reasonable system that could have been adopted for said service. This defendant saith that on said July 21, 1918, said telephone lines had not been taken possession of by the President of the United States under the said joint resolution of Congress, and the defendant Albert S. Burleson, as Postmaster General, had not begun the control and supervision thereof under the proclamation of the President. This defendant denies that said order had any relation to or was considered in relation to the transmission of Government communications, or the issue of stocks and bonds of this defendant, or of its effect upon either of said matters. Upon information this defendant admits that the statements as to the terms and conditions of said classification are substantially correct, but this defendant denies that the person-to-person calls alluded to therein and the exaction of the service charge therefor results in a discriminatory or unfair charge to the State of Kansas as compared with other patrons.

8. This defendant admits that prior to August 1, 1918, it published and maintained schedules of rates and charges for the transaction of telephone toll messages between telephone stations in Kansas and telephone stations outside of Kansas, and that the same were upon the basis of rates set out in paragraph 6 for intrastate application. This defendant avers that the defendant Albert S. Burleson, as Postmaster General, continued to charge said rates after he took possession on said August 1, 1918, until the same were changed by him, as hereinafter set forth.

9. This defendant admits the allegations in paragraph 9 of said bill of complaint.

10. This defendant admits the allegations in paragraph 10 of said bill of complaint.

11. This defendant admits the allegations in paragraph 11 of said bill of complaint.

12. Upon information and belief this defendant admits that on December 13, 1918, the defendant Albert S. Burleson, as Postmaster General, issued his Order No. 2495, a copy of which is attached and made a part of said bill of complaint as Exhibit "A" thereof; and that the said order was made effective at 12.01 a. m., January 21, 1919, and established classifications and schedules of toll rates for both interstate and intrastate telephone messages. This defendant denies each and every of the further allegations of said paragraph 12, and especially denies any arrangement between this defendant and Albert S. Burleson, as Postmaster General, and this defendant denies that the defendant Albert S. Burleson unlawfully issued any orders or that this defendant issued any orders, but saith that it was acting wholly as the agent of the defendant Albert S. Burleson, as Postmaster General, in carrying into effect the said proclamation of the President, and that its employees and officers were the agents and employees of the defendant Albert S. Burleson, as Postmaster General; and that both it and its said employees and officers were but carrying out the orders of the said Albert S. Burleson, as Postmaster General, and that the same were lawful; and that the rates charged and collected were moneys charged and collected by the defendant Albert S. Burleson, as Postmaster General, and are and were the property of the United States of America; and that this defendant had no right, title or interest therein, as it was to be paid for the use of its lines by the said United States Government under and by virtue of the provisions for just compensation set forth in said joint resolution of Congress, which is set forth in said paragraph 9 of said bill of complaint.

13. This defendant denies each and every averment of paragraph 13 to the effect that the classification and schedule

of rates instituted and ordered by the said Exhibit "A" are in anywise unlawful, arbitrary or unjust or impose arbitrary and unjust conditions upon the use of telephone service by complainant or the public, and it denies each and every allegation of the said paragraph 13 except as the same is to be found in said Exhibit "A."

14. This defendant denies paragraph 14 except the statement that the charges of complainant for the transmission of toll messages will be increased not less than $5,000 per year, as to which this defendant is without information and can neither admit nor deny the same, but calls for strict proof.

15. This defendant admits the contentions of defendants as to the meaning and effect of the joint resolution of Congress and of the proclamation of the President and as to the contention of the complainant concerning the same, but this defendant denies that such controversy exists between this defendant or this defendant and the defendant Albert S. Burleson and the said complainant, but saith that the said controversy is one between the said complainant and the United States of America, which has not been made a party to this suit, and which has not consented to be sued by the said State of Kansas in this or any other action in respect to the subject-matter of this bill of complaint; wherefore the same should be dismissed. This defendant further denies the correctness of each and every of the contentions of the said complainant as set forth in said paragraph 15 of said bill of complaint and denies that the said complainant is entitled to any of the relief prayed for.

Further answering said bill of complaint, this defendant saith that, up to and including 12 o'clock midnight on the 31st day of July, 1918, it operated the telephone system, consisting of certain telephone lines and telephone exchanges in the State of Kansas and elsewhere, and furnished telephone service for hire to the public generally, both intrastate and interstate.

That on April 6, 1917, the Congress of the United States

of America declared a state of war between the said United States and the Imperial German Government, and directed "that the President be and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government, and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

That on July 16, 1918, in furtherance of said declaration, the said Congress adopted the joint resolution which is set forth in the words and figures in paragraph 9 of the bill of complaint in this cause, and that, acting under the authority of said resolution, the President of the United States, on July 22, 1918, issued a proclamation under and by virtue of said joint resolution, and of all other powers thereto him enabling, which said proclamation is set forth in the words and figures stated in paragraph 10 of said bill of complaint.

That, pursuant to said proclamation, the President of the United States did, at 12 o'clock midnight on the 31st day of July, 1918, take possession and assume control and supervision of the telephone lines and exchanges and all equipment and appurtenances thereto belonging, with all material and supplies, of this defendant, and exercised the supervision, possession, control and operation of said telephone lines, equipment and supplies by and through the defendant Albert S. Burleson, as Postmaster General of the United States; and to carry out the said duties imposed upon him by said proclamation of said President the defendant Albert S. Burleson, as Postmaster General, on August 1, 1918, issued his Order No. 1783, which is fully set forth in paragraph 11 of said bill of complaint.

That since July 31, 1918, the defendant Albert S. Burleson, as Postmaster General, has performed the duties imposed upon and accepted by him under the proclamation of the President with respect to the property of this defendant, and has operated said telephone system through the board of directors, officers and employees of this defendant and has

operated the same as directed by the said proclamation of the President in the name of this defendant, transacting all business and operation in said name, collecting and depositing all revenues from operations in said name, paying the expenses of operation in said name, furnishing telephone services and transmitting messages between points within said State of Kansas and otherwise in the name of this defendant.

That from and after 12 o'clock midnight on the 31st day of July, 1918, this defendant, in its corporate right, ceased to be engaged in the operation of its telephone system, and its certain telephone lines and exchanges aforesaid, and from said day up to and including the time of the filing of the said bill of complaint herein, this defendant was not and is not now operating in its corporate right any telephone exchanges or facilities in the State aforesaid. Its officers and employees since said date, and up to and including the present time, have been in charge or control of the operations of the aforesaid telephone lines and telephone exchanges, and are transacting the usual business connected with the operation of said telephone lines and exchanges, not as officers or agents of this defendant in its corporate capacity, but as agents and representatives of the Postmaster General of the United States.

The Postmaster General of the United States may at any time, without notice to this defendant, wholly remove this defendant of and from all connection with the operation of said telephone system, and substitute other persons in place of this defendant; or may at any time direct that said telephose system cease to be operated in the name of this defendant.

This defendant is a subsidiary of the American Telephone and Telegraph Company, a majority of its capital stock being owned by said company. The American Telephone and Telegraph Company, on October 5, 1918, entered into a contract with the defendant Albert S. Burleson, as Postmaster General of the United States, fixing a basis of compensation for the Bell system during the period of Federal control; and this defendant, as a subsidiary of the Ameri-

can Telephone and Telegraph Company, has become a party to said contract, as therein provided and contemplated. This contract, among other things, provides that the Postmaster General, in his capacity as aforesaid, shall operate and maintain the property of the Bell system at a standard of efficiency relatively equal to that of the past, shall set aside specified reserves for depreciation and amortization, and shall pay all interest charges on the outstanding securities of this defendant and regular dividends on its capital stock. This said contract further provides that the Postmaster General shall receive all revenues resulting from the operation by the Postmaster General of the aforesaid systems, both inter and intrastate.

This defendant avers that the defendant Albert S. Burleson, as an individual, has no interest whatever in the said charges and tolls made for telephone service on the lines and system of this defendant being operated by the said Albert S. Burleson as Postmaster General, and that he personally derives no profit therefrom, but that the proceeds thereof are entirely the property of the United States of America. That there has been placed in his charge and control as such Postmaster General the operation of said telephone lines for all purposes. That the duty is therefore upon the said Albert S. Burleson, as Postmaster General, and the powers vested in him on behalf of the United States of America, and the President thereof acting under and by virtue of the authority of said joint resolution of Congress, to fix a proper schedule of rates and charges for the toll service and different items of charge to be made in the operation of said telephone system and lines by him as such Postmaster General; the same including both interstate and intrastate business and operations. That the said schedule of rates and charges promulgated on December 13, 1918, effective January 21, 1919, was made because the same, after the experience of operating said telephone lines and systems from August 1, 1918, was found to be just and reasonable and necessary in order to carry on said business and to procure

the revenue necessary for operations and to pay the charges incident thereto.

This defendant avers that, in making said schedule of rates and charges and promulgating said order of December 13, 1918, the defendant Albert S. Burleson, as Postmaster General, was acting as a public officer, as Postmaster General, and said rates were fixed not by this defendant, but by the said Albert S. Burleson as a public officer and official, *to wit*, as the Postmaster General of the United States, discharging a public duty under the terms of said joint resolution of Congress and said proclamation of said President.

This defendant avers that the police regulations of the State of Kansas and the authority thereunder and the exercise thereof by delegation to the Public Utilities Commission for the State of Kansas do not embrace or cover, nor purport to embrace or cover, the regulation of approval or disapproval of a schedule of rates and charges for the operation of a telephone line or system being operated by the officers of the United States of America by virtue of a resolution of the Congress of the United States.

This defendant avers that the said Albert S. Burleson was fully authorized by said joint resolution and said proclamation of the President thereunder to issue said order Exhibit "A" of said bill of complaint and to put the same into effect without submitting the same or obtaining the approval thereof by the Public Utilities Commission of the State of Kansas; and that the action of this defendant has been entirely lawful and should not be enjoined.

And, having fully answered, this defendant prays to be hence dismissed.

SOUTHWESTERN BELL TELEPHONE CO.,
By DAVID A. FRANK,
Solicitor for Defendant.

DAVID A. FRANK,
St. Louis, Mo.,
Attorney for Defendants.

(40335)

INDEX.

CASES CITED.

PUBLIC DOCUMENTS REFERRED TO.

In the Supreme Court of the United States

October Term, 1918.

IN EQUITY.

THE STATE OF KANSAS, Complainant,

vs.

ALBERT S. BURLESON, Postmaster General, and SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Defendants.

Brief of Complainant.

STATEMENT.

The bill of complaint in this case was presented to the Court on March 10 and permission given to file the same as an original bill in equity on March 17, 1919. The State of Kansas complainant, prays for an injunction prohibiting the defendants from putting into

effect a certain classification and schedules of toll rates for long distance telephone business intrastate and interstate, and thus compelling the State of Kansas to pay the charges provided for in said classification and schedules of toll rates for the use of the telephone in transaction of its corporate and governmental business as a state.

Each of the defendants has filed an answer. The answers contain a motion to dismiss, for numerous reasons specifically set forth therein, and in addition to said motion an affirmative answer, stating many of the same facts averred in the bill, from which the defendants draw different conclusions from the ones set forth by the complainant.

By agreement the case is submitted upon the pleadings.

The bill avers that the State of Kansas is compelled in the transaction of its corporate and governmental business and affairs to employ the defendant Southwestern Bell Telephone Company in the transmission of telephone toll messages both within the State of Kansas and in the transmission of interstate telephone toll messages.

That prior to July 16, 1918, the date of the Joint Resolution of Congress, hereinafter referred to, the defendant Southwestern Bell Telephone Company, a Missouri corporation, had been duly permitted by the laws of the State of Kansas to engage in the business of transmitting telephone toll messages within the State of Kansas, and was enguged under the laws of said

state, and of the United States in the transmission of interstate messages of the same character.

That since said date and since the issuance of the Proclamation of the President, August 1, 1918, the defendants have continued said business under the terms, requirements and conditions of said Joint Resolution and the Proclamation of the President.

That on December 13, 1918, the President having assumed under said Joint Resolution and by means of said Proclamation, the control, supervision and operation of the telephone systems of the country, through and by means of the Postmaster General, an order, known as Order No. 2495, was issued by the Postmaster General attempting to put into force and effect a classification and schedule of telephone rates which were illegal and made without authority of law.

That the complainant will be compelled to pay said unlawful rates unless the defendants are enjoined by this Court from putting the same into effect.

The bill further avers that such unlawful conduct on the part of the defendants will increase the charges to the complainants for the transmission of telephone toll messages in a sum not less than $5,000 per year.

It is further averred that under the laws of the State of Kansas telephone toll rates and certain practices and regulations of service had been fixed for the defendant Southwestern Bell Telephone Company by rules and regulations of the Public Utilities Commission for the State of Kansas and by its approval of rates, practices and rules proposed by the defendant

Southwestern Bell Telephone Comapny for the transmission of its local business within the state, and that this complainant was and still is entitled to the benefits of such rates and practices in such service.

That the Southwestern Bell Telephone Company had also, under the requirements of the existing laws of Congress, published and established its interstate rates, and that the defendant Burleson was and is without authority of law to interfere with such interstate telephone toll rates, and is and was without authority of law to compel the complainant to pay the increased illegal rates demanded by it under said Order No. 2495.

The inconveniences and loss to the complainant are more particularly set forth in the bill of complaint, but are not repeated here, as it is thought that the foregoing statement taken with the statements of the answer and motion to dismiss will fully present to the Court the questions of law involved.

For the same reasons the Joint Resolution of Congress, complainant's bill, page 7; the Proclamation of the President, complainant's bill, page 8; the statement of the Postmaster General, complainant's bill, page 11; the text of Order No. 2495, complainant's bill, page 19; and the telephone toll rates in effect within the State of Kansas at the time of the issuance of said Order No. 2495, complainant's bill, page 5, are all omitted from this brief.

The answers of the defendants are identical. It is averred therein that this suit should be dismissed because the United States of America is an indispensable

party there to, and that the Federal government has not given its consent to be sued.

It is further stated that the defendant Burleson, through his agent, the Southwestern Bell Telephone Company, operated the properties involved under and by virtue of said Joint Resolution and the Proclamation of the President, the Government having assumed the control, supervision and operation of said properties.

It is further averred that from and after twelve o'clock midnight, July 31, 1918, the defendant telephone company in its corporate rights ceased to be engaged in the operation of the telephone system, and from said day, up to and including the time of the filing of the bill of complaint herein, the defendant telephone company was not, and is not now, operating in its corporate rights any telephone exchanges or facilities in the State of Kansas.

That defendant telephone company is a subsidiary of the American Telegraph and Telephone Company, the majority of its capital stock being owned by said company, and that the latter company on October 5, 1918, entered into a contract with the defendant, as Postmaster General of the United States, fixing a basis of compensation for the Bell system during the period of Federal control, and that thereby the Southwestern Bell Telephone Company become a party to said contract, and that under its terms and agreements the revenues resulting from the operation of the property by the Postmaster General, both interstate and intra-

state, became the property of the Federal government.

That it became the right of the Postmaster General, and therefore the power is vested in him, on behalf of the United States and the President thereof, to fix a proper schedule of rates and charges for the toll service and different items of charge to be made in the operation of said telephone system and lines.

That in promulgating said order of December 13, 1918, the Postmaster General was acting as a public officer, and that said rates were fixed, not by said telephone company, but by himself as such officer and in discharge of his duties under the terms of said Joint Resolution and Proclamation of the President.

That the police regulations of the State of Kansas and the authority thereunder and the exercise thereof, by delegation to the Public Utilities Commission for the State of Kansas, do not embrace or cover, nor purport to embrace or cover, in the case of approval or disapproval of a schedule of rates for the operation of a telephone line or system operated by the officers of the United States of America or by virtue of a resolution of the Congress of the United States.

It is further averred that the defendant was fully authorized by said Joint Resolution and the Proclamation of the President thereunder to issue said Order 2495 and to put the same into effect without submitting the same to or obtain the approval thereof by the Public Utilities Commission for the State of Kansas.

No serious question of fact is involved in this case. We believe none of the foregoing facts are disputed,

with the possible exception of the amount of the State's interest in this controversy. The answer, as we understand it, calls for proof as to the allegation of the complainant that its telephone toll charges will be increased $5000 per annum by the operation of the new rates promulgated by the Postmaster General. However, as the questions in dispute are entirely questions of law, and the State's interest is not and cannot be denied, it is not thought necessary to take proof as to the amount of that interest.

From the foregoing it will appear that the following propositions of law are involved in this controversy:

1. Is this suit one which may be maintained in the name of the State and of which this Court has original jurisdiction?

2. Did the President in taking over the telephone lines act in any sense under his authority as commander in Chief of the Army and Navy, or was such action taken wholly in pursuance of the Joint Resolution of Congress; and if the latter, was not the power of the President and his agents limited by the terms and requirements of the Resolution?

3. Are the Constitutional powers of Congress to make war and to raise armies subject to and limited by the other provisions of the Constitution, or may Congress exceed these limitations in time of war?

4. Is the suit one against the United States or the Presiden?

5. Has he Congress delegated to the President or

the Postmaster General the power to regulate telephone toll rates?

6. Can the Congress constitutionally confer upon the President the authority to arbitrarily fix and regulate telephone toll rates without any right to appeal to the courts as to the reasonableness of such rates and without fixing any standard by which the President should fix or administer such rates?

7. Can the Postmaster General, under the Joint Resolution of Congress, exact from the State the payment of higher intrastate telephone toll rates than were in effect when the telephone properties were taken over by the Government in violation of the laws of the State?

8. May the State enjoin the exaction from it of unlawfully made interstate telephone toll rates?

ARGUMENT.

I.

Is the suit one which may be maintained in the name of the State and of which this Court has original jurisdiction?

This question is not raised by the pleadings in the case and we apprehend no argument against the jurisdiction of the Court will be made. However, as the question of jurisdiction is one which the Court may always raise we include in this brief a memorandum of authorities which we think sustains the right of the complainant to the relief demanded, as well as the

right to prosecute the suit as an original proceeding in this Court. The State has an interest in the controversy over the payment of illegal rates sufficient to entitle it to invoke the original jurisdiction of this Court where the State is compelled in its corporate or governmental capacity to pay from its own funds such illegal rates. (State of Missouri vs. Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533.)

The State has the right to apply to this Court for injunctive relief to protect its proprietary or property interests or the depleting of its revenues by a citizen of a sister state. (Foster's Federal Practice, 5 ed., vol. 1, pp. 6-7; Pennsylvania vs. Wheeling & B. Bridge Co., 13 How. 518.)

Threatened enforcement or exaction of illegal rates constitutes cause for injunction in favor of the party threatened to be injured. (Macon Grocery Co. vs. Atlantic Coast ine Railroad Co., 215 U. S. 501.)

In the State of Pennsylvania vs. Wheeling & Belmont Bridge Company, supra, this Court held that "the State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation which would be injured in their revenues by the obstruction in the River Ohio created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this Court in the exercise of original jurisdiction for an injunction to remove the obstruction."

In the case of the State of Texas vs. White, 7 Wallace, 700, complainant, the State of Texas, filed a bill

claiming certain bonds of the United States as its property. The bill prayed for an injunction restraining the defendant from receiving payment from the national government, and to compel the surrender of the bonds to the State. The Court held that the State could authorize an attorney to bring an action in its name.

In the State of Florida vs. Anderson, 91 U. S. 667, this Court held that "a State which has a direct interest in a railroad, by reason of holding $4,000,000 of bonds which are a statutory lien upon the road, and where the trustees of the bonds are merely agents of the state, invested with the legal title of the lands, may seek equitable relief against citizens of another state by filing an original bill in this Court to subject the road to the payment of such bonds."

In the State of Kansas vs. Colorado, 185 U. S. 125, this Court held that "a controversy between States, of which the Supreme Court of the United States has original jurisdiction, is presented by a bill filed by the State of Kansas against the State of Colorado, whose averments raise the question whether the latter State has the power wholly to deprive the State of Kansas of the benefit of water from the Arkansas River which rises in Colorado and by nature flows into and through Kansas." The bill in this case alleges among other things that the State of Kansas was the owner of certain tracts of land, used for the maintenance of a soldiers' home and an industrial reformatory, which depended entirely on the flow of water in the bed of the river and on the underflow beneath the land; that

the State was and had been during its entire ownership of the tract using a large portion of the same for raising grain, fruits, vegetables and grasses thereon for the needs of the said institutions located thereon, and that the state, as the owner of said lands, was entitled to the full, free and natural flow of all waters which naturally would flow in said river and beneath said land. The original jurisdiction of the Supreme Court of the United States was upheld by this Court in a later decision in the Kansas-Colorado case, 206 U. S., 46.

In the case of South Dakota vs. North Carolina, supra, the Court held that "the original jurisdiction of the Federal Supreme Court under the United States Const., Article 3, Section 2, over 'controversy between two or more states,' extends to a suit by the State of South Dakota as the donee of the holders of certain bonds issued by the State of North Carolina and secured by mortgage of railroad stock belonging to that state, to compel payment of the bonds and a subjection of the mortgaged property to the satisfaction of the debt."

In the case of the State of Missouri vs. Chicago, Burlington & Quincy R. R. Company, supra, this Court took jurisdiction in an original suit brought by the State of Missouri against the C. B. & Q. R. Co. to recover a sum of money for passenger fares in excess of the rate established by law paid by its officers when traveling within the State on State business. No question of the jurisdiction of the Court was raised at

the hearing. Counsel for the railroad company in their brief alleged that the right of the State to make claim on behalf of its several officers was not made apparent, but admitted that if the right of restoration existed, "it arose in favor of and is held by the state in its proprietary capacity. On such account alone it can sue here in this, an original, proceeding."

The bill in this case alleges that the State is being charged irregular and excessive rates by the defendant for the use of its telephone toll service in the transaction of the state's corporate and governmental business and affairs, to the injury of its revenues and in violation of the provisions of the Constitution of the United States.

II and III.

The action of the President under the joint resolution was taken in pursuance of his authority under the civil law and not in any sense under the authority of military or martial law, nor in the exercise of his authority as commander in chief of the army and navy.

Where federal authority is unopposed and the courts open for administration of justice, constitutional guarantees of liberty cannot be disturbed by the President, Congress, or the judiciary, in any exigency. The constitution was intended for state of war as well as peace, and is a law for rulers as well as people. (*Ex Parte Milligan*, 4 Wallace, 2-142.)

Mr. Chief Justice Chase, speaking for the minority, dissenting in part from the opinion in the above case, but not from the result, distinguished between the civil and military jurisdiction by giving the following definitions:

"There are under the constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time ofrebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States or during rebellion within the limits of the States maintaining adhesion to the national government when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the nation forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily when the action of Congress, or temporarily when the action of Congress

cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no onger adequately secures public safety and private rights."

We think it clearly appears that the action of the President in issuing his proclamation under the authority of the joint resolution of Congress was not taken under either of the three classes of law referred to by the eminent chief justice, but was taken under the authority of Congress in enacting legislation to carry on the war. These enactments of Congress operate only in accordance with the limitations and provisions of the federal constitution.

United States vs. Lee, 106 U. S. 218.
Johnson vs. Jones, 44 Ill. 157, 92, Am. Dec. 172.
McLaughlin vs. Green, 50 Miss. 466.
Martin vs. Snowden, 18 Gratt. 142.

"The populace being loyal and the territory domestic, private rights of person and property still persist, though subject, as in all other cases, to the exercise of the police powers of the state. Those who exercise these powers, though military in character, still remain liable for any abuse of their authority. The civil courts are not necessarily closed, nor are any of the private actions of individuals subject to restraint, except in so far as the efficiency of public service may require.

Private property may be seized and appropriated to a public use without the consent of the owner when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use, which, under the provisions of the fifth amendment, demands that compensation be made. The manner of taking may, however, be that of the police power, in that the urgency may not permit the ordinary proceeding for valuation and condemnation." (Willoughby's Constitutional Law, p. 1242; United States vs. Russell, 13 Wall. 623.)

Former Justice Charles E. Hughes, in a very ably and carefully prepared address given before the American Bar Association on the subject of the war powers under the constitution, said:

> "It is also to be observed that the power exercised by the President in time of war is greatly augmented, outside of his functions as commander in chief, through legislation of Congress increasing his administrative authority. War demands the highest degree of efficient organization, and Congress, in the nature of things, cannot prescribe many important details as it legislates for the purpose of meeting the exigencies of war. Never is adaptation of legislation to practical ends so urgently required, and hence Congress naturally

in very large measure confers upon the President the authority to ascertain and determine various states of fact to which legislative measures are addressed. Further, a wide range of provisions relating to the organization and government of the army and navy which Congress might enact if it saw fit, it authorizes the President to prescribe. The principles governing the delegation of legislative power are clear, and while they are of the utmost importance when properly applied, they are are not such as to make the appropriate exercise of legislative power impracticable. 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of thing upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' (See Field vs. Clark, 143 U. S. 649, 694.) *Congress cannot be permitted to abandon to others its proper legislative functions; but in time of war, when legislation must be adapted to many situations of the utmost complexity, which must be dealt with effectively and promptly, there is special need for flexibility and for every resource of practicality; and, of*

course, whether the limits of permissible delegation are in any case overstepped always remains a judicial question. We thus not only find these great war powers conferred upon the Congress and the President, respectively, but also a vast increase of administrative authority through legislative action springing from the necessities of war."

From the foregoing authorities the following propositions clearly appear:

(*a*) Any legislative authority possessed by the President by virtue of the joint resolution "was administrative of the will of the people as expressed by the Congress,' was founded upon the civil law, and was to be exercised under the restrictions and limitations of that law and the provisions of the constitution.

(*b*) The Congress did not, and could not, directly delegate legislative power.

(*c*) The President, as commander in chief of the army and navy, could not exercise legislative power over territory situated within the United States, and more than three thousand miles from the theater of actual warfare, where the entire citizenship was superlatively loyal and the federal and state courts open to exercise their jurisdiction, and the civil law therefor in full force and effect. Congress could not add to the powers of the commander in chief under the constitution.

It follows from what is said heretofore on this question that the only effect of the joint resolution of Con-

gress was to declare the telephone business of the country to be a public business in relation to the national government, and thereby to enable the government to take possession and control of it. Since telephone and telegraph companies were already public businesses in which the government of the United States had the right to engage, it appears that the joint resolution of Congress neither added nor took away from the powers of the national government, and is material only as fixing a means by which these properties were to be taken by the national government. This brings us face to face with the proposition as to whether the national government could engage in the intrastate telephone business. There is much argument on the side of the proposition that since the states are sovereign and the right to control or even engage in businesses of a public nature are attributes of a sovereign power, that the national government is solely without authority to engage in such businesses or to interfere with the states in their control and management thereof.

It seems unnecessary, however, to settle that question in this case, for the reason that it is plain that Congress did not intend that the federal government should interfere in intrastate business. (Illinois Central R. C. vs. McKendree, 203 U. S. 514; Employe's Liability Cases, 207 U. S. 453, 498.)

In the latter case the Court said:

"The completely internal commerce of the State

is reserved to itself for regulation, and an act of Congress undertaking to regulate it is void."

In the very recent case of Hammer vs. Dagenhart, 247 U. S. 251, this Court, construing the statute commonly known as the Child's Labor Law, said:

> "The maintenance of the authority of the State over matters purely local is as essential to the preservation of our institutions as is a conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> "In interpreting the Constitution it must never be forgotten that the Nation is made up of States, of which are entrusted the powers of local government. And to them, and to the people, the powers not expressly delegated to the National government are reserved. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authorities is inherent and has never been surrendered to the general government."

Whatever may be though of the Nation's power to do so, or of the propriety of its allowing an incidental use of property taken over for war purposes, such as the wire systems, by the public for hire or compensation, it is still evident that Congress, by the use of the proviso, intended that the local business should be left within the power and control of the State. See

Reagan vs. The Mercantile Trust Co., 154 U. S. 413, discussed in another division of this brief.

We think this case is decisive of two points discussed in the present case; namely, that the power to raise armies and carry on war is to be exercised by Congress in pursuance of and in accord with all of the other provisions and limitations of the Constitution; and second, that where the government engages, or permits a government agency to engage in local business, such business will remain in control of the police regulations of the state unless it is otherwise specifically provided by the Congress.

Additional authorities holding that the fact that the Nation has embarked upon the prosecution of a war does not suspend the provisions of the Constitution in peaceful territory, and that Congress in the levying of taxes or taking other means for the prosecution of the war is subject to the same fundamental law of the land as are other agencies of government and the citizen, are as follows:

In the great case of Rose vs. Himely, 4 Cranch. 241, 293, the Court, speaking by Justice Marshall, said:

> "Admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offenses,

which law is to be applied by courts, the nature of the law and of the proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign powers; and whether the Court in applying this law to particular cases acts as a prize court or as a court enforcing municipal regulations."

See also Ex Parte McDonald, 49 Montana, 475, L. R. A. 1915-B, 988; The Prize Cases, 2 Black, 673; Miller vs. The United States, 11 Wall. 307.

In the latter case the Court was called upon to determine the validity of the confiscation acts of 1861 and 1862. Referring to the Rose case and commenting upon that decision the Court said:

"It has been argued, however, that the provisions of the act for confiscation are not confined in their operation to the property of enemies, but they are applicable to the property of persons not enemies, within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield to it our assent. It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies."

And again in this decision the Court said:

"The framers of the Constitution guarded against excesses that had existed during the Revolutionary struggle. . . . It was with these facts

fresh in memory, and with the full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. It did prohibit ex post facto laws. It did prohibit bills of attainder. They had also been passed by the states; but it imposed no restriction upon the power to prosecute war or confiscate enemies' property. It seems to be a fair interference from the omission that it was intended the government should have the power of carrying on war as it had been carried on during the Revolution, and therefore should have the right to confiscate an enemy's property, not only the property of foreign enemies, but also that of domestic, and of the aiders and abettors and comforters of a public enemy."

Following this rule the conclusion is inevitable that Congress was not, in taking over the wire lines of America, acting under its belligerent rights or as against any foreign or domestic foe. It was simply exercising its right to provide means for the war under municipal authority. It follows also that any war powers conferred upon the Congress of the United States by the Constitution which are free from the limitations or inhibitions of the Constitution as applied to other Congressional powers fall within the category of powers to be exercised by the Federal Government in its belligerent capacity and directly against the enemies of the government. For example, in the very wording of the Constitution itself, authority is

conferred upon Congress to raise and support armies, *but no appropriation of money to that use shall be for a longer term than two years.* The argument of the defendant in this case amounts to saying that the first part of this provision confers upon the government unlimited power, and that the last part of the clause is inoperative. This, of course, is an absurdity and clearly shows that in the exercise of the powers of the government to raise money, or in any other exercise of civil authority, the Federal Government is bound by the limitations of the Constitution in peaceful territory.

In the case of United States vs. Russell, supra, this Court held that where property was taken for military purposes the former owner had the right to resort to the Court of Claims under the civil jurisdiction of the government for the adjustment of damages.

In the case of McCray vs. The United States, 195 U. S. 27, it was held:

> "Undoubtedly both the fifth and tenth amendments qualify in so far as they are applicable to all of the provisions of the Constitution."

It is beyond controversy, then, that in so far as the "war power" of Congress is exerted as against enemies, alien or domestic, the power is absolute and unrestrained by any other provision of the Constitution; but in so far as the "war power" of Congress is exerted in pursuance of the sovereign governmental powers in peaceful territory, directed against its own loyal citizens, the provisions of the Constitution are

in force and do control the powers to be exercised by Congress. The taking over of the wire properties to be employed by Congress, not only in the purposes of the government but in the transaction of both interstate and intrastate business, were subject to all the provisions of the common law and the constitutional, civil and municipal powers of government then in force in the territory of the United States.

IV.

Is the suit one against the United States or the President?

The contention of the defendants that the United States is a necessary party is the same question that was presented in U. S. vs. Lee, 106 U. S. 196. In that case Coffman and Strong, as officers and agents of the United States, held possession of certain real estate in Virginia known as Arlington and constituting a national cemetery in which were interred the remains of Union soldiers. The Attorney General of the United States appealed and made the claim that possession of the defendants was the possession of the United States, and that the defendants were acting under the direction of the executive department and were exempt from liability upon the ground that the suit was in reality against the United States, and that the United States could not be sued without its consent. The court, speaking by Mr. Justice Miller in deciding the case, said:

"The defendant stands here solely upon the absolutely immunity from judicial inquiry of everyone who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power."

The court in that case submitted the question of the title to the property in question to a jury, which found that the title was in he plaintiff. The court rendered judgment against the defendants. Its judgment was affirmed by the Supreme Court of the United States. That court, in affirming the judgment, said:

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, *acting under the orders of the President*, have seized this estate and converted one part of it into a military fort and another into a cemetery . . .

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . .

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, *because the President has ordered it and his officers are in possession?*

"If such be the law of this country it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, *Stop here; I hold by order of the President, and the progress of justice must be stayed.*".

The doctrine of the Lee case has been followed by the Supreme Court of the United States in the following cases:

Cunningham vs. Macon & Brunswick R. R., 109 U. S. 446.

Tindall vs. Westley, 167 U. S. 204.
American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94.
Hopkins vs. Clemson College, 221 U. S. 636.
Philadelphia Company vs. Stimson, 223 U. S. 605.

In the case of American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, this Court said:

"To authorize the interference of the Postmaster General, the facts stated must, in some aspect, be sufficient to permit him, under the statutes, to make the order.

"The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."

In the case of Hopkins vs. Clemson Agricultural College, 221 U. S., 636, this Court reviewed the cases following the principles announced in the Lee case, and said:

"But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law., For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders . . . whenever they interpose the shield of the state?

. . . The whole frame and scheme of the political institutions of this country, state and Federal protest' against extending to any agent the sovereign's exemption from legal process. Poindexter vs. Greenhow, 114 U. S. 270, 291, 29 L. ed. 185, 193, 5 Sup. Ct. Rep. 903, 962.

The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by

public officers. If they were indeed agents, acting for the state, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. Cunningham vs. Macon & B. R. Co., 109 U. S. 446, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609. But if it appeared that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of emergency has no application,—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury. . . .

Other cases might be cited which deny public boards, agents, and officers immunity from suit. But the principle underlying the decisions is the same. All recognize that the state, as a sovereign, is not subject to suit; that the state cannot be enjoined; and that the state's officers, when sued, cannot be restrained from enforcing the state's laws, or be held liable for the consequences flowing from obedience to the state's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce un-

constitutional statutes, or to justify under them, or obtain immunity through them, fails in his defense and in his clai mof exemption from suit."

In the case of Philadelphia Company vs. Stimson, 223 U. S. 605, which was a suit to enjoin the Secretary of War from causing criminal proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed harbor limits established by the Secretary of War, who claimed to act under the authority of Congress, in passing upon the question as to whether the proceeding was virtually a suit against the United States the Court, speaking through Mr. Justice Hughes, said:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

V.

Congress has not delegated to the President the power to regulate telephone rates.

The joint resolution of Congress does not purport to confer upon the President the power to initiate or regulate telephone rates. The authority undertaken to be given to the President by the resolution was to empower him to supervise or to take possession and assume control of any telephone system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war. Nothing is contained in the resolution which directly authorizes the President to make telephone rates, but it is contended that the power to control and operate the telephone system includes the power to fix rates. The complainant contends that the law is otherwise. The power to possess, control and operate a public utility like a telephone system does not involve the exercise of legislative authority. It is the exercise of administrative power and dominion over the property. In the case of strictly private property such power is free from regulation. In the case of property devoted to a public use the power is subject to regulation by governmental authority. Where governmental regulations apply to rates of charges for a public service the authority to fix such rates is vested in the legislative body of the government and cannot be delegated to any one else. The legislature may fix

such rates by direct action of its own, or it may enact a law prescribing the measure and standard of rates to be charged to the public, and authorize an administrative body to administer the law; but in all cases the validity of a rate must rest upon the sanction of the legislature.

The authority to operate a public utility does not include the power to regulate rates and charges to the public. The Congress, in committing to an executive officer the authority to supervise, operate and control the instrumentality of a public service, has never authorized such executive officer to fix the charges to be assessed against the public for the use of such public service. The Postmaster General does not fix the postage rates. The Secretary of the Treasury does not fix the rate of interest to be charged by national banks. The Panama Canal Commission does not fix the rate of tolls to be charged for use of the canal. The Department of the government having control and supervision of the irrigating systems constructed and maintained by the government does not fix the price of water to be used for irrigation purposes. The departments of the government having jurisdiction of these great and important public utilities exercise the fullest control and supervision over these governmental agencies, but none of them have the power to fix the rates to be charged to the public for the service rendered by them. All such rates are either fixed and regulated by Congress or made subject to the regu-

lation by the several states in which the business is transacted.

In the American School of Magnetic Healing case the Court said:

> "Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the Court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order.
>
> That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in

case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

VI.

Congress cannot constitutionally confer upon the President the authority to arbitrarily fix and regulate telephone toll rates without any right to appeal to the courts as to the reasonableness of such rates, and without fixing any standard by which the President should fix or regulate such rates.

Nothing is better settled relating to the exercise of power under the principles of our form of government than that arbitrary power cannot be exercised by any official of the government, and Congress has no authority under the constitution to delegate arbitrary power to any one. In the case of Wick Wo vs. Hopkins, 118 U. S. 356, the Court said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

The principle upon which Congress is permitted to delegate authority involving the exercise of discretionary power, in order that legislation may be practical,

is that Congress legislates and its delegate administers within defined limits, and that the exercise of the delegated power is always the subject of judicial inquiry. The establishment of appropriate limitations conditions the authority to delegate, and delegation without limits is unconstitutional.

If it can be deemed that the joint resolution of Congress conferred upon the President the power to fix telephone rates, such power is conferred without limitations, for nothing is contained in said joint resolution which in any way prescribes or limits the rate which the President may fix. No measure or standard of rates is prescribed by the law. The authority delegated to the President to fix rates, if delegated at all (which we deny), is without limit, and confers upon the President arbitrary power to fix whatever rate he pleases without any legal restraint whatever, free from judicial inquiry. This is the exercise of purely arbitrary power and is unconstitutional and void.

The power to fix telephone rates is the power to make a law. It is the exercise of legislative power. Congress cannot delegates its legislative power to the President, or to any one else. In the case of Field v. Clark, 143 U. S. 649, the Supreme Court of the United States said:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of things

upon which the law makes, or intends to make, its own action depend."

The same principle is affirmed in the following cases:

Buttfield v. Stranahan, 192 U. S., 470.
Union Bridge Co. v. U. S., 204 U. S., 364.
Lewis v. Frick, 233 U. S., 291.
Tang Tun v. Edsell, 223 U. S., 673.
Gegiow v. Uhl, 239 U. S., 3.
Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., 88.

In the Union Bridge Company case the Supreme Court, quoting from the decision in the Field case, said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."

In the cas of the Interstate Commerce Commission v. Louisville & Nashville R. R. Co. the government contended that the rates fixed by the Interstate Commerce Commission could not be set aside, even if the finding was wholly without substantial evidence to support it. In passing upon the question this Court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty

of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The joint resolution of Congress does not prescribe rates that are to be charged for telephone service. It does not make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend with respect to the rates to be charged for the transmission of telephone messages. As was said by the Supreme Court in the case of American School of Magnetic Healing vs. McAnnulty, *supra*, in referring to the right of the postmaster, by direction of the Postmaster General, to exclude the plaintiff's letters from the mails,—"His right to exclude letters, or to refuse to permit their delivery to the persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them"—so here,

the right of the defendant to fix telephone rates under the orders of the Postmaster General must depend upon some law of Congress fixing the rates or standard of rates proposed to be fixed or regulated by the Postmaster General. If no such law exists the defendant cannot establish the rates, for he has no law to guide him as to what the rates shall be, and no constitutional authority to make such law has been or could be delegated to the President or his agent, the Postmaster General. The absence of a law of Congress fixing the measure or standard of rates, and limiting the power of the President or the Postmaster General in administering and regulating the rates, makes it impossible for the President or his agent, the Postmaster General, to prescribe any legal rates to be charged for telephone service.

The Act to Regulate Interstate Commerce provides as follows:

> "The provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United

States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act. . . .

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercila, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages. . . . Whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined

in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The joint resolution of Congress did not repeal or in any way affect the law which commits to the Interstate Commerce Commission the right to regulate telephone rates within the limits and in the manner prescribed by the Act to Regulate Commerce. It is apparent that if Congress had intended to confer upon

the President the power to regulate telephone rates during the period of the war and to suspend the power of the Interstate Commerce Commission with respect to this subject during the period of governmental control, it would have made its purpose clear by the insertion of appropriate provisions in the joint resolution. This was not done, and it is clear that the Interstate Commerce Commission and not the Postmaster General has been authorized by Congress to regulate interstate telephone rates, and as will be shown by authorities cited later on in this brief, Congress has no authority whatever to regulate the intrastate rates involved in this proceeding.

VII.

Can the Postmaster General, under the Joint Resolution of Congress, exact from the State the payment of higher intrastate telephone toll rates than were in effect when the telephone properties were taken over by the Governmnt in violation of the laws of the State?

Little has been said in the foregoing parts of this brief concerning the constitution of the Joint Resolution of Congress. Manifestly, where language is plain, construction is unnecessary. Giving this Resolution its plain, ordinary meaning, the intention of Congress was to reserve to the states the regulation of the wire systems enjoyed by them at the time the wires were taken

over by the Government. To adopt the language of the Supreme Court of Mississippi in the case brought by that State against the Postmaster General, decided April 21st of the present year:

> "The Constitution did not confer upon the President as Commander in Chief of the Army the power to operate telegraph and telephone systems as a public utility outside military zones, and Congress in granting such power had full authority to define its limits. The Act of Congress of July 16, 1918, authorizing the President to take over and operate the telegraph and telephone systems of the country was intended only to safeguard the transmission by the Government of its own messages and the issuance of stocks and bonds by such systems; hence the proviso reserving to the states the exercise of lawful police regulations was not limited to such police powers as promoted the public health, morals and safety, but embraced a regulation fixing the tolls to be charged for intrastate telephone messages; and this was true notwithstanding the fact that the statutes of the State controlling such intrastate rates were adopted prior to the taking over of such systems by the Government."

It is practically conceded by everyone connected with this litigation that such would be the plain intendment of the law. In attempting a construction of the act, in view of any claim annuity in its meaning, we are met first

with the familiar maxim that the construction of the act which will render it constitutional must be adopted rather than one which will make the act unconstitutional or its validity doubtful. If we are correct in the principles which we have attempted to maintain in the previous divisions of this brief, then to give the act the construction claimed for it by the defendants would be to render the act unconstitutional, as in violation of the fourth and fifth amendments to the Constitution, as well as of the tenth.

Again, it is a familiar rule of construction that the proviso to an act, while strictly construed, must nevertheless be given effect. It cannot be ignored. The elementary rule is, of course, as so happily stated by Mr. Justice Story in Mince vs. United States, 15 Pet. 423:

> "The office of a proviso generally either is to except something from the enacting clause or to qualify or restore its generalities, or to exclude some possible ground of mis-interpretation of it as extending to cases not intended by the Legislature to be brought within its purview."

Applying this rule to the proviso in question, we can readily see that the Joint Resolution without the proviso, according to our view of the powers of Congress, would have been unconstitutional, and it was probably for this reason more than any other that Congress deemed it wise to settle this doubt by lan-

guage which would reserve to the states their constitutional powers.

The only answer vouchsafed by the defendants to this argument is that of tacitly admitting its truth, but by way of avoidance of the result of such admission, pleading, that by the language employed the powers exempted to the state were those of merely "police regulation," and that these powers embraced only the right of local government to protect the health morals and safety of its inhabitants.

In view of the fact that this question will be argued in all of the briefs in the four cases now before the Court it is not deemed necessary to indulge in an extended discussion of this proposition. The writers of this brief are not able to accept the construction of the language contended for by the defendants' counsel when it is asserted that the proviso reserves the full powers of the states and the full effects of their laws as to taxation, but reserves only the police powers in a limited sense. To our mind it is clear that Congress used these words in association with each other, and that when the words "laws" and "powers" were used they were general terms meant to include all of the less general terms, if such they were, which followed. (Lewis' Sutherland Statutory Construction, Vol. 2, Sec. 414 (262). See also Sec. 397, as to the meaning of the words "or" and "and".

We submit that a fair reading of the proviso, excluding its reference to taxation, is as follows:

"Provided further that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the several states in relation to . . . the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications or the issue of stocks and bonds by such system or systems."

It is conceded by the briefs of the defendants that the use of the second proviso, referring to the issuance of stocks and bonds, could only apply to the broader meaning of the term "polic powers and regulations" in the proviso. It is conceded that such an exemption from a police regulation, in the meaning claimed for such words by the defendants, would not have been made by Congress. The only answer made by the defendants to this argument of consequence is that the reference to "stocks and bonds in the exception is pure surplusage." This is accounted for on the assumption that the language was adopted from the Railroad Act, and that in Sec. 7 of the Railroad Act there were provisions which referred to the issuance of stocks and bonds. So sure is the Solicitor for the Postoffice Department of this position that in a brief generally circulated in the United States upon this question he says:

"The effect of an exception to a proviso is to restore to the body of the resolution that which is excepted. Its effect here would be to put back into the body of the resolution the control over

issues of stocks and bonds. This demonstrates our proposition, for it is apparent upon even the most casual examination that the thing restored to the body of the resolution was never there. This is a complete *reductio ad absurdum.*"

Is it possible that the learned Solicitors who prepared this brief have overlooked the fact that on April 5, 1918, Congress, had taken to itself the control of all, or practically all of the stocks and bonds of the country during the period of the war by means of the Capital Issues Committee. (Sec. 40 Statutes, Sec. 400-c 45.)

To have enacted this wire resolution without any reference to stocks and bonds and with a proviso exempting to the states their full police powers would have been to have repealed, so far as telephone and telegraph companies were concerned, the provisions of this far-reaching and broadly worded Capital Issues Committee act.

The conclusion is inevitable, that Congress knew exactly what it was doing and intended to leave the local conduct and control of the intrastate business of these local utilities to the local laws, retaining all of the provisions of the Capital Issues Committee act and other provisions of the so-called war legislation intended to accomplish conservation of resources, capital and energy for the prosecution of the war.

The narrower meaning of the term "Police Regulation".

A careful examination of all of the cases cited by the Solicitors who have represented the Postmaster General in the numerous suits brought within the last few months in the United States on this question have failed to convince us that the term "police regulation," even in its narrowest sense, does not include the power of regulation of rates. It is said that this is a power not to be found within the purpose of local government to secure the health, morals and comfort of its people, but we submit in this very controversy the claim is made that one of the principal purposes for taking over the control of the wire systems of the country was for the purpose of preventing strikes and other evidences of disorder in the communities where the telephone systems were used. At the time of the preparation of this brief local exchanges are being compelled to change rates upon the express declaration of the Postmaster General that the change is necessary for the purpose of providing funds with which to increase the pay of employes, and that such action is necessary in order to prevent a strike on the part of the employes and the cessation of the service now being performed by the utility. Should a bread roit occur in one of the cities tomorrow, would it be contended that the right to fix the weight of a loaf of bread and the price would not be one of the first things thought of for the purpose of restoring order and the

comfort of the inhabitants of the city? In fact, rate making of the various commodities and honesty in the markets of the necessaries of life, as well as convenience of public service, have been the very reason upon which the legislative right and duty to make rates has been founded at all times.

In the case of Hammer vs. Dagenhart, referred to elsewhere in this brief, this Court, in a case of the greatest importance to both the nation and the states, quoted with approval the words of Chief Justice Marshall (9 Wheaton, 203) as follows:

> "They (inspection laws) act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepared it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government,—all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

See also Chesapeake, etc. Telephone Co. vs. Manning, 186 U. S. 238. In Ann. Cas. 1912-D, p. 308, note, the following language is used:

> "A telephone company is engaged in a business affected with the public interest, and the state,

in the exercise of its police power, may regulate the rates and charges of such company and provide a maximum rate which the charge shall not exceed, prvided that no rate prescribed is unreasonable."

It would be useless to multiply authorities showing where Congress has used the word "police regulation" to include the right to make rates. We believe a fair examination of such authorities will show that the expression "police regulation" has been used fully as many times to include the broadest meaning of the state's power of government as it has been used to express the narrower meaning contended for by the defendants in this case, and finally, that in cases where such meaning has been intended by the use of the term "police regulation" in no sense can it be said that such regulation did not include, in many cases, the right to make rates.

Record of amendments to the Railroad Control Bill, which contains the proviso found in the joint resolution, and was passed prior to the joint resolution.

The bill was presented in the Senate February 11 (see p. 1939, Congressional Record). At 1944 it was stated by Mr. Smith, who had charge of the same:

"The bill under consideration was drafted by the administration and modified by the Interstate Commerce Committee of the Senate to meet the situation."

In presenting his summary of the bill to the House, Mr. Sims, who apparently had charge of the same for the administration, stated in the House, on February 19, 1918, at page 2337:

> "On the other hand, it is manifestly impracticable and undesirable for the President or any agencies he may create to readjust our present rate fabric. Comparatively little of it ought to be readjusted, and such necessary adjustment should come tentatively and only to meet obvious needs. Our committee was of the opinion that section 11 meets the situation in the least objectionable and in the most practicable way. It provides that, except as the President may from time to time otherwise order, rates shall continue to be and to be determined as hitherto.
>
> "This leaves the Interstate Commerce Commission and the state commissions to proceed, precisely as hitherto, in the determination of all rate questions, unless and until the President, in the exercise of the war power, shall order otherwise."

Volume 56, Part III, 65th Congress, p. 2360, contains a discussion by Mr. Snook of the clause relative to the authority to initiate and fix rates. And on that page appears an excerpt from the testimony of Mr. McAdoo before the committee, in which he states, as to intrastate rates, "I think that the state commissions ought to continue to consider such questions as they rise," and that in a conference he had told them that they

should go ahead and hear cases and exercise their powers as theretofore, subject to the power of the President to override their decision when he thought it necessary to do so in the public interest, and stated: "It is therefore plain that therefore plain that there is to be no change in the present method of fixing rates, except in exceptional cases, and then only when an emergency arises making such course necessary."

Senator Underwood, February 20, p. 2377, Congressional Record, contended—

> "that the bill should not be passed unless within within the folds of the bill remains the provision to allow the Interstate Commerce Commission to continue to functionate and review any rate that is put upon the people of this country from any source."

At page 2378, Senator Sherman objected to impairing or invading the power of the Interstate Commerce Commission. Mr. Poindexter stated in the Senate (p. 2387):

> "It was the avowed purpose of the Director General not to interfere in general with the rate-making duties and authority either of the interstate or state commissions."

In referring to this section as "11" Mr. Sims obviously misspoke, as the section then, as now, was numbered 10, and is the same as printed above, and practically identical with the section as finally enacted.

At that time, however, there was nothing in the bill in any way corresponding to section 15 thereof, quoted as above, as finally enacted, except that section 13 of the act provided: "That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the states in relation to taxation."

In this form the bill passed the Senate on February 21 (calendar day, February 22). Congressional Record, Second Session, 65th Congress, page 2519.

When the bill went into the House of Representatives it was amended by striking out everything after the enacting clause, making various changes therein, but the most significant was to present for the first time the equivalent to section 15 as it now appears. Section 16 of the bill so amended provided:

> "That nothing in this act shall be construed to amend repeal, impair or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, *the regulation of rates*, the expenditure of revenues, the addition to or improvement of properties, or the issue of stocks and bonds."

This bill, as so amended, passed the House of Representatives by a vote of 339 voting "aye," six vot-

ing "nay," one voting "present," and eighty-one not voting.

Following the passage of the bill as thus amended in the House, it appears, at 2838 and 2839, that the House insisted upon its amendment, and arrangement was made for further conference upon the bill. Thereafter conference committees were duly appointed, and the bill in its present form reported to both houses, with the phrase "regulation of rates" omitted.

The conference report on the railroad bill was presented to the Senate, March 13, 1918, debated, and rejected on a point of order, which appeared to call for the discussion of the intent and effect of the proviso under consideration here.

The Vice President stated (p. 3420, Congressional Record):

> "The Senate of the United States passed this proviso in this bill:
>
> "'That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation.'
>
> "The House of Representatives, in the substituted bill, included that language exactly, and added to it:
>
> "'or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war mate-

rials, or government supplies, the regulation of rates, the expenditure of revenues, the addition to or improvement of properties or the issue of stocks and bonds.'"

Mr. Pomerene stated:

"It is true that one of the subjects of state control has been the question of taxation. The Senate adopted the provision as read. The House adopted that provision plus something more, namely, a limitation upon the power of the state over the subject of taxation. But that was not all. The House went further and said, upon the subject of control, we are going to reserve to the states the power over the subject of taxation and *also the police power of the states* as theretofore."

At page 3432, Senate bill 3752 was again submitted to the Senate by Mr. Smith, of South Carolina. The bill as finally adopted appears in the Record in full (pp. 3433-3435). From 3436 to 3443 there is a discussion of the bill, and the record of its adoption appears on that page, on March 13, 1918; but nothing in the discussion throws any further light on the intent and meaning of the proviso here in question. On the same date (3461-3462) conference report was presented in the House by Mr. Sims of the committee. At 3492 it was again called up by Mr. Sims. At 3495, March 14, there appears a statement presented to accompany the bill, in which it was said:

"The conferees agreed to strike out section 16 of the House amendment and substitute therefor a new section as set out in section 15 of the conference report. The substitute section provides that this act shall not be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

At 3496 there is a significant and interesting statement not bearing on the question here, but in a general way bearing on the scope of the power conferred by Congress, made in the House by the chairman of the conference committee, Mr. Sims:

"Mr. Speaker, if the order of the President violated the provisions of this act, or was not authorized by it, it would be void, because he would have no authority to make it, and of course, any order made by him must be made in accordance with and in pursuance of the authority given him by the act of August, 1916, or by this act, and any order made outside of the authority conferred by those acts would be absolutely void."

At 3496 the following exchange of views took place:

Mr. Osborne: "I call the attention of the gentleman from Tennessee to the explanation in the

statement of the managers of section 15, page 11. That explanation is as follows:

"'The substitute section also provides that this act shall not be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to the lawful police regulations of the state'—

"And so forth, leaving out the word 'taxation,' which appears in the section. Was that intended?"

Mr. Sims: "The act plainly exempts the states from any kind of control with reference to taxation. The other language that the gentleman refers to simply has reference to the police powers of the states."

Mr. Esch, also a member of the conference committee, speaking at 3499, said, as to the power of the President generally, and as to this section:

"With reference to the provision that was referred to here as to 'any order of the President,' I think that has been explained. We must interpret those words in the light of the section in which the words appear; and if so interpreted they will not give to the President this broad and unlimited power to repeal or suspend any statute of the United States or any statute of a state.

"With reference to section 15, relating to the taxing power, we have practically gotten back to the house provision."

Thereupon (March 14, p. 3500) the conference report was agreed to.

We find then there was the same general diversity of view of just what the net result of the various provisions of the bill might be, but we think the phrasing of the amended bill as it first passed the House conclusively sets at rest any doubt there may be as to the sense in which the term "police regulations" was used by Congress in both of the acts in question. *It was used in the sense of regulation of rates;* and the inference is that, having omitted the phrase from both the Railroad Control bill and the Wire Control bill, it was expressly intended not to except the regulation of rates by the states from the terms of the proviso. We submit, in other words, that Congress understood and intended to use the words "police regulation" in these enactments, however they may have been intended in other enactments, in exactly the same sense as th Supreme Court of the United States used those words. In the sense, for instance, in which they are applied in Reagan vs. Mercantile Trust Co., 154 U. S., at p. 417, whre language substantially parallel to the proviso is used: "We are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state, in all matters of taxation, *rates and other police regulations.*"

So that we think that this consideration alone disposes of all need of inquiry as to the meaning of "police regulations." It is a final demonstration that rate regulation is included within the power of police regu-

lation preserved. That this amendment may be consulted to determine what Congress meant in the Railroad act, and hence in the Wire act, is, of course, obvious.

> Sutherland, Stat. Const. 470, p. 880: "Amendments made, or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration."

The Kansas Public Utilities Law includes a utility operated by the Federal Government as "lessee", "trustee", or "receiver" and the State can be compelled to pay no more than the legal rates established by the Commission under the provisions of the State law.

The State in its corporate capacity can be compelled to pay no more for the use of the utility than any other customer of the utility or any citizen of the State.

"A State means all the citizens which comprise that State and are integral parts of it, all together forming a body politic" (Penhallow vs. Doane, 3 Dal., 54). The State, as such body politic, has all the property rights in its corporate capacity that are possessed by any of its citizens. The right to use a public utility is undoubtedly a property right. Bennett vs. Twin Falls North Side Land & Water Co., 130 Pac., 336.

The local laws of the State provided a full and complete scheme of rate-making, the rates in many cases

to be initiated by the public utility itself and subject only to reasonable legislative control. As has been fully discussed in other parts of this brief, this legislative control was open to supervision by the courts as to the reasonableness and constitutionality of the rates prescribed. It cannot be said, therefore, that the State was not entitled to enjoy the same rates on intrastate business as were enjoyed by other patrons of the telephone company.

To deny the foregoing propositions would be to deny the benefits of the Fifth and Tenth Amendments to the Constitution of the United States to the State in its corporate capacity.

It is contended in the various briefs filed on behalf of the Government in the proceedings relating to the telephone rates, as well as in this case, "that conceding *arguendo* that the reservation to the states of the 'lawful police regulation of the several states' embraces the power to regulate intrastate rates for telephone service furnished by the United States, no state has ever enacted any law applicable to the United States in the operation of this federal agency. Until the power is exercised by passing the appropriate legislation no state law is being violated, hence no injunction can issue."

We submit that this proposition must wholly fail as applied to the State laws of Kansas. The Public Utilities law of this State, in defining the powers of the Commission, uses the broadest and most general anguage, and confers upon the Commission "full power,

authority and jurisdiction to supervise and control the public utilities doing business in the State of Kansas." In defining these public utilities, later in the act, section 3, the following language is used:

> "The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof, for the transmission of telephone messages, or the transmission of telegraph messages in or through any part of the state," etc.

It will be noted that while, as the Supreme Court of the State has said, it is the corporation or company which constitutes the utility, it is only when such corporation or utility is connected with "a plant" that it constitutes a utility. Excepted from this general definition are utilities owned by any municipality, mutual telephone companies, and a utility situated and and operated wholly or principally within any city, or operated principally for the benefit of such city or its people.

It will thus appear that the language of the act is broad enough to cover everything except those especially excepted; and under the general rule of interpretation of statutes, the fact that exceptions were made tends to prove that the legislative intent was to use the broadest and most general language possible

applicable to the subject, and language which would have included the exception or proviso had it not been used.

Proceeding now to the brief, or briefs, of the defendant, we find in a brief scattered generally throughout the United States by W. H. Lamar, solicitor for the Postoffice Department, and which bears also the name of Charles M. Bracelen, Esq., who has generally appeared in telephone proceedings on the part of the Government, the following statements in relation to the Government's interest or title in the wire system of the country. On page 56 of this brief it is said:

> "The telephone companies retain the bare legal title to the properties, with the right of just compensation for their use by the Government during Federal control."

And again, the President in his proclamation directed that the Postmaster General, so long and to such extent as he saw fit, should continue the operation of the systems through the owners, managers, directors, receivers, officers and employees of the systems, in the names of the respective companies. For the most part the Postmaster General has continued to operate in their names and through the regular company organizations, retaining the companies and the regular operating personnel as his agents. On page 57 of this brief the following statement is made:

> "The point is urged that the companies are the creatures of the states, incorporated under and by

virtue of the laws of the states, and amenable to their laws. This is true as to companies, but that gives the states no jurisdiction over the United States. The United States is no way dependent upon the corporate franchises of the companies. It operates the telephones under its paramount constitutional power—the war power."

We think it must be conceded from the above admissions that the Government, in so far as it exercises any control over the wire systems, does so at "lessee" or "trustee" for the companies themselves. It has undertaken, it is said, under the so-called war power, to supervise or control the conduct of the defendant's business. But the defendants still are admitted to be the agents of the Government. They are still, to that extent at least, engaged in the same business in which they were engaged prior to the so-called taking by the Government. There is no more authority for saying that the companies have been wholly excluded from their interest in the business than there is for saying that the companies have been excluded from their title to the property. There is simply a joint use and occupation for Governmental purposes, in so far as Governmental purposes apply to or inhere in the use being made of the properties. In addition to this, however, it is claimed that the Government has taken on, as a sort of side line, so to speak, an intrastate business for the benefit of the people.

Now we submit that that business, under the proviso

of the resolution, was to exist subject to the State laws to the same extent and in the same manner as it existed at the time of the resolution.

One of the important provisions of the Public Utilities law is that—

> "No franchise granted to a common carrier or a public utility governed by the provisions of this act shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or right thereunder be valid or of any force or effect whatsoever unless the assignment, transfer, lease, contract or agreement shall have been approved by the commission." (See section 36.)

But it will be said the State law cannot interfere with the Federal law. We reply: The Federal law especially exempted the State law from its operation and gave validity to it. Its effect in this case was the same, in so far as the State law provided that the company then owning the utility should continue to own and operate it unless consent of the Commission was given for the transfer of its title or control, as if the proviso had said in terms that the intrastate business shall be continued to be operated by the local companies until the State shall give its consent to a change.

In other words, the construction of the proviso contended for by the defendants in this case means that the proviso shall have no effect whatever. This, of course, is little short of absurd. It is a waste of

words to say that Congress inserted so important a proviso in the resolution, but meant that it should have no effect whatever, because at every turn of the road in which it was to apply to and protect State or police regulations the Government is on hand to say "the State regulations cannot include Federal operations or conflict with Federal laws."

This statement answers the arguments of the brief on pages 58 and 59, where it is contended that the State cannot assert any control over a Federal agency. The answer is, of course, that the proviso exempts the agency from Federal control and leaves it under State control.

Again, it is stated on page 60 of the brief that "one agency of government will not be deemed subject to another such agency unless the legislative body has clearly provided that it shall be." There is a notable lack of judicial authority to sustain this statement. Indeed, the writer of the brief takes refuge, in lieu of judicial authority, in quotations from the Congressional Record, which he admits are of but doubtful value on the construction of the statute, but in this case even many of the quotations are parts of a debate upon another bill. In fact, the rule is quite contrary to the statement of the brief. Where a State or other sovereign or agency of the sovereign engages in the business of a public utility or other business for the benefit of the public, it does so in its corporate capacity and not in its governmental capacity, and is therefore subject to all the rules, laws and regulations of the

community in which it engages in such business. (See Pond's Public Utilities, secs. 5, 6 and 7; Dillon's Municipal Corporations, sec. 109, and cases cited; U. S. vs. New Orleans, 98 U. S. 381.)

Touching the question of the application of State laws of a general nature to Federal agencies employed in domestic business of a State, and the necessity of an exact, specific inclusion of such agencies under a State regulation in order to give such State authority over such agency, we submit that the rule is quite to the contrary from the one asserted by the defendants, and that even as to the governmental purposes of such agency, the local laws will control unless Congress, for the purpose of protecting such agency in its governmental purposes, has by appropriate and reasonable legislation protected such agency from State interference. This rule flows from and is based upon the police powers of the State and its sovereign control over its local and domestic affairs.

We call the attention of the Court to the statement of the general rule on this question, taken from the Encyclopedia of Supreme Court Reports, Volume 4, first at page 156. It is said:

> "*Exclusive Powers of the States.* It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the

United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely, 'The powers not delegated to the United States are reserved to the States respectively, or to the people.' The States, resting upon their original basis of sovereignty, subject only to the exceptin is stated, exercise their power over everything connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general Government. All those powers which relate merely to municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to these, the authority of the State is complete, unqualified and exclusive."

Page 173, "Internal Commerce of the States":

"There is an internal commerce subject only to the control of the State within which it is carried on. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This

limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State. Every State, therefore, may regulate its own internal traffic according to its own judgment and upon its own views as to the interest and well being of its citizens. Under this power the States may prescribe the form of all commercial contracts, as well as the terms and conditions upon which internal trade may be carried on."

Page 204, "State Regulation of Rates Where Corporation was Organized under Law of the United States":

"A corporation organized under the laws of the United States is subject to the control of the State as to rates which are wholly within the State. The fact that it receives all its franchises from Congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the State, from the control of the State in all matters of taxation, rates, and other police regulations.'

Cited under this text is the case of Reagan vs. The Mercantile Trust Company, 154 U. S. 413, 38 Law Ed. 1028. This case is decisive of this question and every other proposition in this suit. It arose under the Union Pacific Railroad acts, which the Court will remember were enacted by Congress for the purpose of constructing a transcontinental line during the closing years of

the Civil War. It was defended as a war measure, one statesman of the time expressing it that "Congress had bound the Union together with bands of steel." A part of this system was the Texas & Pacific Railroad, chartered by Congress, the Federal Government owning a large share of the bonds and having contracts with the Union Pacific generally for the use of the road for the purposes of war and the defense of the nation. It was claimed that these facts made the Texas & Pacific a Federal agency, free from taxation by the local authorities and free from control as to rates in intrastate commerce by the State Railroad Commission. The Supreme Court held to the contrary, the decision being based in part upon Thompson vs. Union Pacific, 76 U. S., which involved the construction of the telegraph acts. Quoting from the Thompson case, the Court said:

> "'In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thompson vs. Union Pacific. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails or troops or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other prop-

erty in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general Government, and, if it is not, it is prohibited by no constitutional implication.

"'Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interest of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state con-

trol, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business.'"

VIII.

May the State enjoin the exaction from it of unlawfully made interstate telephone rates?

It has been fully shown in other parts of this brief that the attempt of the Postmaster General to fix interstate rates was unauthorized and illegal. The rates in operation by the telephone companies at the time the properties were taken over by the Government and which were continued by the Government up until January 21, 1919, were legal rates. It must be presumed they had been legally made and published, in accordance with the provisions of the Interstate Commerce Act, which have also been referred to elsewhere in this brief. Kennedy vs. Railway, 104 Kan. 129. If the state had the right to use the telephone toll lines in intrastate business at legally established rates, as we feel sure we have shown herein, then the state had the same right to pay only the legal rates for the use of the toll lines in interstate business. The

state had nothing to do with the fixing of interstate rates and has the right in its corporate capacity to use the telephone toll service at the rates prescribed in accordance with the laws of Congress relating to interstate commerce, to the same extent as other telephone patrons. For these reasons the state is entitled to be protected by injunction from the collection of such illegal interstate rates.

We earnestly contend that the President nor the Postmaster General were authorized to fix rates for either intrastate or interstate telephone toll business and that the demands of the Postmaster General upon the State of Kansas requiring the payment of rates fixed by him are arbitrary and unlawful. For these reasons and for the further reason that the Joint Resolution of Congress shows plainly that Congress intended that the states should be protected in the enjoyment of all of their local powers of government, the injunction prayed for by the complainant should be issued and a decree awarded to the complainant for costs herein.

Respectfully submitted,

RICHARD J. HOPKINS,
Attorney General,
A. E. HELM,
FRED S. JACKSON,
Solicitors for Complainant.

Topeka, Kansas, May 5, 1919.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE STATE OF KANSAS, Complainant, *v.* ALBERT S. BURLESON, Postmaster General of the United States, and Southwestern Bell Telephone Company, a Corporation, Defendants.	Original No. 31.

BRIEF FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

INTRODUCTION.

The State of Kansas, by bill in equity, invokes the original jurisdiction of this court to enjoin the Postmaster General of the United States and Southwestern Bell Telephone Company, a corporation, from enforcing or attempting to enforce an order of the Postmaster General effective January 21, 1919, establishing a classification of service and schedule of charges for telephone service furnished by telephone systems under control of the United States. The bill was filed by leave of court on March 17, 1919; answers containing also motions to dismiss were filed

by the respective defendants on April 19, 1919, and April 24, 1919; and the case has been advanced for hearing upon the pleadings.

ALLEGATIONS OF THE BILL.

The essential allegations of the bill may be summarized as follows:

That Southwestern Bell Telephone Company (hereafter called Southwestern Company) is engaged in transacting a general telephone toll business, both intrastate and interstate, in the State of Kansas. That complainant, in the conduct of its corporate and Government business, is compelled to employ the company as a common carrier in the transmission of both intrastate and interstate toll messages. (III, IV.)

That prior to January 21, 1919, Southwestern Company published and charged for intrastate messages, schedules of rates and charges voluntarily fixed by it and approved by the Public Utilities Commission for the State of Kansas. That such schedules were and are the lawful schedules which the company is authorized to charge complainant under the provisions of chapter 238 of the laws of Kansas of 1911. (V–VII.)

That prior to January 21, 1919, Southwestern Company published and maintained schedules of rates and charges according to law for the transmission of toll and long-distance messages between stations in the State of Kansas and stations in other States; that such rates were and are the legal rates authorized

to be charged by said company to the complainant and other telephone users, and that said rates were and are on the same basis as the rates established for intrastate service. (VIII.)

That said section 238 of the Laws of Kansas of 1911 constituted the board of railroad commissioners of the State a public utilities commission for said State, and gave to it full power over all public utilities, which included corporations, companies, individuals, associations of persons, their trustees, lessees, or receivers then or thereafter owning, operating, controlling, or managing, except for private use, any telephone or telegraph plant for the transmission of messages throughout the State. (VI.)

That said act required said public utilities to furnish reasonably efficient and sufficient service, to establish just and reasonable rates and charges without unjust or unreasonable discrimination, and declared illegal and void every unjust and unreasonable discrimination or charge and prohibited same; and gave to said commission power on its own initiative to investigate all rates and charges, rules and regulations; and if any were found to be unjust or unreasonable to fix the same. Advance changes in rates and charges, rules and regulations were directed to be made only after filling the proposed changes with said commission as provided in said statute. (*Id.*)

That on July 16, 1918, the Congress of the United States passed a joint resolution authorizing and empowering the President, during the continuance

of the present war, whenever he shall deem it necessary for the national security or defense, to supervise, or to take possession and assume control of, any telegraph or telephone system and to operate the same in such manner as may be needful or desirable for the duration of the war; that provision was made for just compensation to the owner and the method of fixing the same; and that it was further provided that nothing in said act should be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems. (IX.)

That on August 1, 1918 (sic), the President issued his proclamation announcing that it was deemed necessary for the national security and defense to take possession and assume control of all telegraph and telephone systems and to operate the same; that he did thereby take possession and assume control of each and every telegraph and telephone system within the jurisdiction of the United States; and directed that the control and operation of such systems should be exercised by and through the Postmaster General, Albert S. Burleson, who was authorized to perform his duties, in such manner and to such extent as he might determine, through the owners, managers, directors, receivers, officers, and employees of such telegraph and telephone

systems; and further directed that until and except so far as said Postmaster General should by orders otherwise provide, such owners, managers, etc., should continue the operation of all such systems in the usual and ordinary course of business in the names of their respective companies. (X.)

That on December 13, 1918, the Postmaster General issued his order No. 2495, effective January 21, 1919, purporting to establish a new classification of service and increased schedule of rates to be charged to complainant and the public for toll telephone service furnished by Southwestern Company, both interstate and intrastate; that said order was made effective unlawfully; by said Southwestern Company on January 21, 1919, and ever since said date said company has continued, without authority of law, to charge and collect from the complainant and the public the unlawful toll telephone rates set forth therein; that said order, while it maintains substantially the zone system of rate making theretofore in effect, creates a classification of toll service and imposes certain arbitrary and unjust conditions upon the use of the telephone service by complainant and the public, depending upon the classification in which the calls made fall. (XII–XIII.)

That all of the classifications and charges made in said Order No. 2495 are arbitrary, unlawful, unreasonable, and discriminatory, as between the rate charged complainant and that charged others, and were established and put into effect by Southwestern Company without authority of law, and will increase the charges

to complainant for telephone toll messages not less than $5,000 a year. (XIV.)

That complainant contends that said resolution and proclamation of the President did not confer upon the Postmaster General the authority to fix or control any toll rates within the State of Kansas, or any interstate telephone toll rates originating within said State or delivered therein by same defendant telephone company, and if the construction of said resolution and proclamation of the President, contended for by the defendants, should be given thereto, then and in that event said resolution and proclamation are unconstitutional and void; that the right to fix and determine telephone rates is one of the inherent powers of local self-government, and included within the police powers of the State, and the right is expressly reserved to complainant, as one of the United States, by the proviso of said joint resolution, and the ninth and tenth amendments of the Federal Constitution; that complainant has the right to have telephone toll charges paid by, based upon the legal and authorized rates, fixed and determined in accordance with its laws, and that this right of complainant will be interfered with and denied by defendants in violation of said ninth and tenth amendments to the Constitution and in violation of the fifth amendment to the Constitution, which provides that no person shall be deprived of property without due process of law. (XV.)

That complainant is without adequate relief in law or in equity, except the relief herein prayed for; that without such relief a multiplicity of suits will result;

that complainant is unable to prosecute or maintain suits to enforce its rights against the defendants, without the presence of said Albert S. Burleson, Postmaster General, as a necessary party and can not sue him elsewhere than in this court. (XV.)

Relief is prayed to the effect that said joint resolution and proclamation be construed that the right of complainant to use the telephone and toll rates and classifications, in effect prior to said Order No. 2495, be preserved and protected; that said order be declared unlawful, unreasonable, arbitrary, unjust and oppressive, and violative of the laws and Constitution of the United States; that defendants be enjoined temporarily and permanently from enforcing or attempting to enforce said order of the Postmaster General; for general relief and for costs.

SUBSTANCE OF THE ANSWERS.

Answers of the defendants are practically identical.

In said answers defendants first moved to dismiss said bill of complaint for the following reasons:

(*a*) That the suit is in effect a suit against the United States of America, which is exempt from suit except by its consent, and that it has not consented to be sued in this action.

(*b*) That the United States of America is an indispensable party to said action, and that the relief therein prayed for can not be granted without the presence of said United States as a party defendant.

(*c*) That the defendant Burleson has taken possession of and is operating said telephone lines under

and by virtue of a resolution of Congress and proclamation of the President, and that relief is sought against this defendant as Postmaster General in carrying out said resolution and proclamation; and it is not denied that said Postmaster General is lawfully in possession of said lines and is operating same by virtue of said joint resolution and proclamation, and that said suit is not one against him as an individual who has taken possession of property and is operating same without authority and warrant of law, and that the same is not of the class of suit which can be maintained without the presence of the United States as a party.

(*d*) That the actions of the defendant Burleson therein complained of were each done by him solely as the agent and under the orders of the President of the United States, and that the President of the United States is not a party defendant to said suit and can not be properly made such party defendant, and said suit is in effect a suit against the President of the United States.

(*e*) Because the matters and things therein set forth do not entitle the complainant to the relief therein prayed or to any relief.

Subject to said motion to dismiss and to the ruling thereon, defendants answered said bill substantially as follows:

That while prior to August 1, 1918, the Southwestern Company was engaged in business in the State of Kansas, and that complainant employed said company for hire in the transmission of both

interstate and intrastate messages, said company denied being so engaged in transacting such business since August 1, 1918, and averred its relation to such business since said time has been only as hereinafter set forth; that while Southwestern Company prior to August 1, 1918, published and charged to the public schedules of rates and charges fixed by said telephone company and approved by the Public Utilities Commission of Kansas, since said date all rates and charges made and charged for telephone messages has been made and charged by the Postmaster General.

The issuance by the Postmaster General on December 13, 1918, of Order No. 2495, effective January 21, 1919, establishing interstate and intrastate telephone rates was admitted, but said order was not issued or put into effect through any arrangement between the defendant Postmaster General and the defendant Southwestern Company; said order was not unlawfully issued by the Postmaster General nor by the defendant Southwestern Company, which was acting wholly as the agent of the Postmaster General in carrying into effect the proclamation of the President; and it and its officers and employees were but carrying out the orders of said Postmaster General, and that the same were lawful; that the rates charged and collected were moneys charged and collected by the Postmaster General and were the property of the United States of America; and that defendant Southwestern Company had no right, title, or interest therein, as it

was to be paid for the use of its lines by the United States under the provisions for just compensation set forth in said joint resolution.

Said answers deny each and every averment of paragraph 13 of said bill to the effect that said classification and schedule of rates instituted and ordered by the Postmaster General are in anywise unlawful, arbitrary, or unjust, or impose arbitrary and unjust conditions upon the use of telephone service by complainant or the public; and they also deny each and every allegation of paragraph 14 except the statement that the charges of complainant for the transmission of telephone toll messages will be increased not less than $5,000 per year, as to which defendants are without information. (The case being heard on the pleadings, these averments of the answer control.)

Defendants admit that they contend as alleged as to the meaning and effect of the joint resolution and proclamation, but deny that a controversy exists between them and the complainant. Said controversy is one between the said complainant and the United States of America, which has not been made a party to the suit and has not consented to be sued. Defendants further deny the correctness of each and every of the contentions of the complainant set up in paragraph 15 of its bill, and deny that complainant is entitled to any of the relief prayed for.

The answers aver that Southwestern Company prior to July 31, 1918, operated as a common carrier a telephone system in the State of Kansas; that on

April 6, 1917, the Congress of the United States declared a state of war between the United States and Germany; that on July 16, 1918, in furtherance of said declaration Congress adopted the joint resolution set out in the bill; and that on July 22, 1918, the President issued the proclamation also set forth in said bill.

That pursuant to said proclamation the President took possession and assumed control and supervision of each and every telephone system in the country, and exercised the supervision, possession, operation, and control of such by and through the defendant Postmaster General; that since July 31, 1918, defendant Postmaster General has performed the duties imposed upon him under said proclamation with respect to the property of Southwestern Company, and has operated said telephone system through the board of directors, officers, and employees of said company, and has operated same in the name of said company.

That from and after said date Southwestern Company in its corporate right ceased to be engaged in the operation of said system; that its officers and employees since said date have been in charge or control of the aforesaid lines, not as officers or agents of said company in its corporate capacity, but as the agents and representatives of the Postmaster General of the United States.

That the Postmaster General may at any time, without notice to Southwestern Company, wholly remove said company from all connection with the

operation of said telephone system, and substitute other persons, or may direct that said system cease to be operated in the name of said company.

The answer avers that an arrangement has been made for compensation by the United States for the use of said telephone system; that said contract provides that the Postmaster General shall receive all revenues resulting from the operation of the aforesaid systems, both interstate and intrastate.

That defendant Postmaster General, as an individual, has no interest whatever in said charges and tolls for telephone service made by systems under his control as Postmaster General; that the proceeds of such operation are the property of the United States; that the telephone systems were placed under his control for all purposes; that the duty is placed upon him and the power vested in him to fix a proper schedule of rates and charges for toll service to be made in the operation of such systems by him as Postmaster General, including both interstate and intrastate business.

That said schedule of rates and charges promulgated by the Postmaster General on December 13, 1918, was made because the same was shown by experience to be just and reasonable and necessary in order to carry on said business; that said rates were not fixed by Southwestern Company but by the Postmaster General as a public officer discharging a public duty under said joint resolution and proclamation.

That the police regulations of the State of Kansas and the exercise thereof by delegation to the Kansas Public Utilities Commission do not embrace or cover or purport to cover the regulation of a schedule of rates and charges for the operation of a telephone line or system by officers of the United States by virtue of a resolution of the Congress of the United States.

That defendant Postmaster General was fully authorized by said joint resolution and proclamation to issue said Order No. 2495 and to put the same into effect without submitting same to, or obtaining the approval of, said public utilities commission.

BRIEF OF ARGUMENT.

I.

An original suit can not be brought in this court by a State against a Cabinet officer, when such suit is in effect one against the United States, in the absence of an express statute so permitting.

Louisiana v. *McAdoo*, 234 U. S. 627, 628–9.

II.

This suit is in effect against the United States and therefore not within the jurisdiction of the courts. It seeks an injunction which, if granted, will restrain the United States in the use of property, its right to the possession and operation of which is not attacked, and would compel the United States to furnish service at risk of loss on rates it has superseded.

Belknap v. *Schild*, 161 U. S. 10.

Cunningham v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446.

Goldberg v. *Daniels*, 231 U. S. 218.

Hopkins v. *Clemson College*, 221 U. S. 636.

International Postal Supply Co. v. *Bruce*, 194 U. S. 601.

Louisiana v. *McAdoo*, 234 U. S. 627.

McLeod et al. v. *New England Tel. & Tel. Company*, Sup. Jud. Ct. Mass., Rec. 957, p. 29.

Pennoyer v. *McConnaughy*, 140 U. S. 1.

Wells v. *Roper*, 246 U. S. 335.

III.

The Congress has recognized the transmission of telephone messages and the business of telephone companies as standing on the same basis as that of telegraph messages and companies. It has classed both as carriers and placed them, when operated by their owners, as to interstate business with railroads, under the Interstate Commerce Commission. The freedom of their interstate business from State regulation is the same as that of railroads.

Compiled Statutes, Section 8563.

IV.

The purpose and effect of said joint resolution and proclamation was completely and exclusively to vest the possession and control of defendant's telephone system in the President through the Postmaster General as his appointee on behalf of the United States.

McLeod et al. v. *New England Tel. & Tel. Co.*, Sup. Jud. Ct. Mass., Rec. 957, pp. 28–29.

V.

The taking possession and assuming control and operation by the President under the joint resolution of July 16, 1918, constituted such systems public utilities operated by the Government, and made it the right and duty of the President and his representatives to fix the charge to be paid for service.

Alabama ex rel. et al. v. *Burleson, et al.*, opinion of Anderson, Chief Justice of Alabama, main brief pp. 31–33.

Atchison, &c. Ry. Co. v. *United States*, 225 U. S. 640.

Attorney General v. *Edison Telephone Co.*, L. R. 6 Q. B. 244.

Ex Parte Milligan, 4 Wall. 2.

Legal Tender Cases, 12 Wall. 457.

Madison, The Federalist, No. XLI, (Lodge's Ed.).

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1, 9.

Railroad Comm. of La. v. *Cumberland Tel. & Tel. Co. et al.*, Sup. Ct. La., main brief pp. 34–35.

Stewart v. *Kahn*, 11 Wall. 493.

VI.

The proviso to the resolution respecting the laws and powers of the States in relation to taxation or the lawful police regulations of the several States do not apply to and cover either the taxation of the United States or the regulation of prices to be charged by it for its operation of said property.

McCulloch v. *Maryland*, 4 Wheat. 316.

Fort Leavenworth R. R. Co. v. *Lowe*, 114 U. S. 525.

Ohio v. *Thomas*, 173 U. S. 276.

Williams v. *Talladega*, 226 U. S. 404.

VII.

The lawful police regulations of the several States which are not affected by the resolution of July 16, 1918, are the police regulations in their strict and accurate sense, and do not embrace the exercise of

powers falling under the definition of police powers in their broader sense.

Freund on Police Power, sec. 10.
Manigault v. *Springs*, 199 U. S. 473.
Sligh v. *Kirkwood*, 237 U. S. 52.
Western Union Tel. Co. v. *Foster*, 247 U. S. 105.
Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347.

VIII.

The meaning of this proviso is the same as that of Section 15 of the Railroad Control Act from which it is taken and it should be so construed.

McDonald v. *Hovey*, 110 U. S. 619.
Interstate Com. Comm. v. *B. & O. R. R. Co.*, 145 U. S., 263.
See brief in *Hines, Director General* v. *North Dakota*, No. 979.

IX.

The debate on this resolution in the Senate sustains the view that the words "lawful police regulations" were used in the ordinary and primary sense.

56 Cong. Rec. 450–451.
See brief in Cases Nos. 957 and 967 in this court.

X.

The provisions of State statutes for the regulation of rates charged by private persons and corporations operating public utilities do not by their terms apply

to rates charged by agents of the Government in the operation of such utilities.

Railroad Comm. of La. v. *Cumberland Tel. Co. et al.*, Sup. Ct. La., main brief pp. 53–54.

The argument in support of these propositions is stated at length in the brief for the defendant telephone companies in Case No. 957, *McLeod et al.* v. *New England Telephone Co.* and Case No. 967, *Dakota Central Telephone Company et al.* v. *The State of South Dakota ex rel. et al.* in this court, to which reference is hereby made with the request that it be taken as a part of this brief.

ALEX. C. KING,
Solicitor General.
DAVID A. FRANK,
Solicitor for Southwestern Bell Telephone Co.

MAY, 1919.

○

Supreme Court of the United States

OCTOBER TERM 1918.

THE STATE OF KANSAS,
Complainant,

vs.

ALBERT S. BURLESON, POSTMASTER GENERAL,
Defendant.

[No. ....]

PUBLIC SERVICE COMMISSION,
Plaintiff in Error,

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Defendant in Error.

[No. ....]

BRIEF OF JOHN G. PRICE, ATTORNEY GENERAL OF OHIO, AMICUS CURIAE.

By leave of court, comes now John G. Price, Attorney General of the State of Ohio, and files this brief **amicus curiae.**

STATEMENT.

First: A resolution was adopted by Congress and approved by the President on July 16, 1918, authorizing the President to assume control of, and operate telegraph and telephone systems.

Attention is invited to the fact that nowhere in this Resolution is there any provision for fixing rates.

Second: Although a proclamation was not provided for in the Resolution, the President on July 22, 1918, by proclamation, assumed control of the telephone systems of the United States, effective July 31, 1918, and placed the same under the supervision and control of Albert S. Burleson, Postmaster General.

It is to be noted that this was done in the capacity of President of the United States under authority of the resolution aforesaid, and not as Commander-in-Chief of the Army and Navy.

Third: On August 1, 1918, though not provided for in the Resolution, Postmaster Burleson issued his Bulletin Number Two, assuming authority and control over the telephone systems.

It is significant that "until further notice telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels", and so far as we are advised, this provision has not been modified.

Fourth: On December 13, 1918, the Postmaster General issued his Order No. 2495, effective January 21, 1919, at 12:01 A. M., inaugurating new rates both interstate and intrastate; and which precipitated the litigation in various states of the United States, some of which cases have reached this court. This Resolution, Proclamation, Bulletin and Order are printed in full in the Bill of Com-

plaint in the Kansas case, and for the sake of brevity are omitted here.

It is under favor of the foregoing resolution, proclamation, bulletin and order that the telephone companies throughout the Union, and Mr. Burleson, Postmaster General, claim the power to fix telephone rates. This power is denied by practically all of the States, on the ground that this action of the Postmaster General and the telephone companies, impairs the police powers of the states, and affects and, in reality, repeals existing police regulations; which the states claim are expressly reserved to them by the Congressional Resolution of July 16, 1918.

PROPOSITION.

We are thus confronted with this plain, succinct proposition: Whether the various steps and proceedings aforesaid, are sufficient to override and overthrow the settled policies, existing police regulations, and existing police powers of the states. We claim the negative of the proposition.

ARGUMENT.

I.

Power of the President is of Two Kinds.

(a) Political power conferred by the constitution, for the exercise of which, or its non-exercise, or its abuse, he is responsible to his conscience and in the court of the people; and

(b) Power conferred by legislative enactment.

In the exercise of this latter power, his authority is limited and prescribed by the enactment itself, which is subject to judicial examination to determine the scope and extent of the authority actually conferred. That is to say, if Congress undertakes to confer on the President, power which he does not possess under the constitution, that power is limited by the Act conferring it.

It cannot be said that in the instant cases the President, through the Postmaster General, is acting as Commander-in-Chief. No enabling resolution is necessary for that purpose; the President himself in his proclamation says that it is by virtue of the Resolution, and the Proclamation is signed, not as Commander-in-Chief, but as President.

Before this change of rates had been anounced, the President had also said in substance to Congress, that the war is over, we have taken off our harness, and turned to the pursuits of peace.

The Proclamation of the President and the Bulletin of the Postmaster General can add nothing to the resolution, nor can they have tne force and effect of law, because this delegation of power did not provide for a proclama-

tion; and if it had so provided, it must be limited by the prescribed powers.

Muir vs. L. & N. Railroad Company, 247 Fed., 888.

In the opinion, the court, page 895, says:

> "Certainly the proposition is so well established as to be elementary that Congress may authorize heads of departments, or other officers, to make regulations within certain limits, and when made within those limits, such regulations have the force and effect of law, and may be enforced as such; but it has often been held, that the delegation of authority to make regulatory orders, gives no power to add to, take from, or modify the limitations prescribed by Congress."

Citing United States vs. 200 Barrels of Whiskey, 95 U. S., 576.

United States vs. 11,150 Pounds of Butter, 195 Fed., 663, 463.

II.

This Resolution does not Authorize the Action Taken by the Postmaster General, but on the Contrary it Expressly reserves such Power to the States.

The last proviso of the Resolution reads as follows:

> "Provided further that nothing in this act shall be construed to **amend, repeal, impair,** or **affect, existing laws or powers** of the state in relation to taxation, or the lawful **police regulations** of the several states, except wherein such laws, powers or regulations may affect the transmission of government communications or the issue of stocks and bonds by such system or systems."

Thus it will be seen that in placing the telephones under the control of the President, Congress was careful to recognize and respect the police powers of the states, and the lawful police regulations of the states, to the extent that the resolution was not "to **amend, repeal,**

impair or affect existing laws or powers of the states relating to * * * the **lawful police regulations** of the several states", except wherein they may affect the transmission of government communications or the issue of stocks and bonds. Not only **existing laws**, but **existing police powers**, are thus preserved in all their strength, except only in the two instances named. This proviso can admit of no other construction. Congress here does not undertake to define police power and police regulations, but does save such power and regulations from the operation of the authority delegated to the President.

If Congress had meant to take away this power from the states, and vest in the President the rate-making powers or other police powers, the last proviso would have been omitted, or Congress would have granted the power to the President in express terms.

III.

The States are in the Lawful Exercise of their Police Powers in Fixing Rates and Exercising Control over Intrastate Telephone Business and Laws Passed in that Behalf are "Lawful Police Regulations."

Lakeshore, etc., Railway Company vs. Cincinnati etc., Railroad Company, 30 O. S., 604.
Cincinnati, etc., Railroad Company vs. Sullivan, 32 O. S., 152, 158.
Cleveland Telephone Company vs. Cleveland, 98 O. S., ... (decided July 2, 1918).
Munn vs. Illinois, 94 U. S., 113; 24 L. Ed., 77.
Budd vs. New York, 143 U. S., 517; 36 L. Ed., 247.
Smyth vs. Ames, 169 U. S., 466; 42 L. Ed., 819.
Chicago Railway Company vs. Illinios, 200 U. S., 561; 50 L. Ed., 596.
In re: Rahrer, 140 U. S., 540; 35 L. Ed., 572.
Minnesota Rate Cases, 230 U. S., 352; 57 L. Ed., 1511.
Reagan vs. Trust Company, 154 U. S., 413; 38 L. Ed., 1014.

The principle here involved is vouchsafed to the States by the Tenth Amendment to the Constitution.

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

In Mormon Church vs. United States, 136 U. S., 1; 34 L. Ed., 478, this court say:

> "The transcendent power of Parliament and the Crown devolved upon the people of the states at the time of the American Revolution."

And in South Carolina vs. United States, 199 U. S., 437; 50 L. Ed., 261, is found this pertinent expression:

> "The police power is in its fullest and broadest sense reserved to the states; the mode of exercising the power is left to their discretion and is not subject to national supervision."

In Traverse City vs. Michigan R. R. Co., 202 Mich., 575, the court say:

> "Speaking generally, the police power is reserved to the states and there is no grant thereof to Congress in the Constitution."

Mr. Chief Justice Fuller, speaking for this court in re Rahrer, 140 U. S., page 540, says:

> "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government."

It would, therefore, appear that the right and power of the states to regulate rates to be charged their inhabitants by public utilities for services wholly within the state, is beyond question, and this regulation under the police power is exercised not by the sufferance of Congress, but under power vested in the state.

The power assumed by the Postmaster General to fix telephone rates for intrastate service, strikes at the very foundation of state government, transfers the seat of regulation to Washington and leaves the states in the position of having granted franchise rights to public utilities to do business within the state, but the rates to be charged therefor must be such as the Postmaster General may direct.

The power of the states to regulate their domestic concerns is absolutely essential to the preservation of local government, and no surrender of such power should be required by any strained construction of the meaning of "lawful police regulations."

IV.

Order No. 2495 by the Postmaster General and Relied upon to Justify the Proposed Rates has no Warrant as a War Measure, and is not Necessary for the National Security or Defense.

It may be said that this is a matter exclusively for the President to determine. If we grant this proposition for the sake of argument, then the President had prior to the promulgation of these rates, officially announced to Congress that the war was at an end.

The court will take judicial notice of the great events of history and of the recent war. Therefore, it has judicial knowledge of the signing of the armistice on No-

vember 11, 1918, and of the messages of the President to Congress, since the Constitution authorizes and requires the President from time to time to give to Congress information as to the state of the Union. The court knows judicially of the President's announcement made to Congress on the same day, in which he said:

> "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German Command to renew it."

The court knows judicially that at the time the proposed rates were promulgated the enemy had been forced to submit to such terms of armistice as to render him helpless—wholly unable to renew the conflict if he would.

The President in an address to both Houses of Congress on December 2, 1918, among other things said:

> "What we all thank God for with deepest gratitude is that our men went in force into the line of battle just at the critical moment when the whole fate of the world seemed to hang in the balance and threw their fresh strength into the ranks of freedom in time to turn the whole tide and sweep of the fateful struggle,—turn it once for all, so that henceforth it was back, back, back for their enemies, always back, never again forward! After that it was only a scant four months before the commanders of the Central Empires knew themselves beaten; and now their very empires are in liquidation! * * *
>
> And now we are sure of the great triumph for which every sacrifice was made. It has come, come in its completeness, and with the pride and inspiration of these days of achievement quick within us we turn to the tasks of peace again,—a peace secure against the violence of irresponsible monarchs and ambitious military coteries and made ready for a new order, for new foundations of justice and fair dealing."
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> * * * * * * * * * *
>
> "While the war lasted we set up many agencies by which to direct the industries of the country in the services it was necessary for them to render, * * *
>
> "But the moment we knew the armistice to have been signed we took the harness off. * * *

> Great industrial plants whose whole output and machinery had been taken over for the uses of the government have been set free to return to the uses to which they were put before the war. * * * It has been the policy of the Executive, therefore, since the armistice was assured, (which is in effect a complete submission of the enemy)" etc.

It will thus be seen from the official statements of the President himself, which statements he was authorized by the Constitution to make, that the action of the Postmaster General with reference to the change in rates, could not be justified upon the ground that there was a war necessity for the same.

It will further be observed that neither the President nor the Postmaster General regarded these rates as necessary for the national security or defense or for winning the war from July 22, 1918, the date of the proclamation, to the signing of the armistice on November 11, 1918, and during which time occurred some of the fiercest fighting of the great war.

If not necessary during that period, who can have the temerity to claim that there was such a necessity thirty-two days after the signing of the armistice, and eleven days after the President had officially informed Congress that "peace had come in all its completeness"?

V.

The Claim that these Actions to Enjoin the Proposed Rates Fixed by the Postmaster General are in Reality Suits Against the United States, is Untenable.

The foregoing proposition is sustained by the following cases:

Smyth vs Ames, 169 U. S., 466; 42 L. Ed., 819.
United States vs. Lee, 106 U. S., 196; 27 L. Ed., 171.
Ex ParteYoung, 209 U. S., 123; 52 L. Ed., 714.
Kansas Natural Gas Company vs. Haskell, 172 Fed. Rep., 545.
School of Magnetic Healing vs. McAnnulty, 187 U. S., 94; 47 L. Ed., 90.
Tindal vs.Wesley, 167 U. S., 204, 213.
Pennoyer vs. McConnaughy, 140 U. S., 1; 35 L. Ed., 363.
Osborn vs. Bank, 22 U. S., 738; 6 L. Ed., 204.
Ex Parte Tyler, 149 U. S., 164; 37 L. Ed., 689.
Scott vs. McDonald, 165 U. S., 58 and 110; 41 L. Ed., 632 and 648.
Western Union Telegraph Company vs. Andrews, 216 U. S., 165; 54 L. Ed., 430.
Home Telephone Company vs. City of Los Angeles, 227 U. S., 278; 57 L. Ed., 510.
Truax vs. Raich, 239 U. S., 33; 60 L. Ed., 131.
Green et al. vs. Interurban Railway Company, 244 U. S., 499; 61 L. Ed., 1280.

VI.

"This is a Government of Law and not a Government of Men."

This court in Smyth vs. Ames, 169 U. S., at page 525, made the above pronouncement; but to permit the Postmaster General to put into operation his proposed rates will be to reverse this sound doctrine and make ours a government of men and not of law.

If the proviso in the congressional resolution has not the meaning for which the states contend, the same is meaningless and the police power of the states and their police regulations are entirely swept away.

It cannot be successfully argued that because no appropriation was made with which to pay operating expenses, rate making power is thereby implied. The members of Congress knew that these utilities were operating at a profit under rates fixed by police regulations of the various states, and assumed that such operation could be continued under governmental control at such rates. If not, the patriotism of the people of the states could be depended upon to such an extent that upon application to their lawfully constituted bodies, the public service commissions, proper rates would be fixed. We maintain that the intention of the resolution was to give the President the **power to operate** the wires as a national unit but not to delegate to him the **rate making power.**

It follows from all the foregoing, that the act of the Postmaster General in attempting to force his proposed rates upon the people of the various states is an arbitrary act, not authorized by the congressional resolution nor the proclamation of the President, and should be enjoined.

Respectfully submitted,

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